Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments

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Casenote

Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments

Laura Bowersett*

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I. INTRODUCTION

More American-based multinational corporations are doing business in third world nations as the world economy becomes increasingly global. Such multinational corporations provide direct foreign investment to developing nations. The political structure of the developing nation often dictates that the American-based firm must work in conjunction with a private or government-run corporation in the host state. This has led to many unique problems for multinational corporations doing business in nations with unsettled socio-political environments. A U.S. multinational corporation aligning itself with a governmental entity in a joint venture may find itself unwittingly brought before a United States court for determination of liability for torts committed by the foreign government in furtherance of the venture. In Doe v. Unocal, Unocal, a U.S. multinational corporation, found itself in this very predicament. In Unocal, the district court labeled Unocal a “slave trader” because of Unocal’s partnership with the oppressive Myanmar government in developing a gas pipeline. The court found jurisdiction against Unocal under the Alien Tort Claims Act.
Part II of this Casenote briefly explains the historical background of the Alien Tort Claims Act, and case law leading up to the decision in *Doe v. Unocal*. Also discussed is the historical development of the Foreign Sovereign Immunities Act and the Act of State doctrine. Part III provides a detailed look at the court's opinion and reasoning in *Doe v. Unocal*. Part IV dissects and critiques the opinion in light of the Alien Tort Claims Act and Foreign Sovereign Immunities Act, as well as prudential concerns incorporated in the Act of State doctrine. Part V concludes with a discussion of the environment that multinational corporations will find themselves competing in if other courts adopt the reasoning in *Doe v. Unocal*.

II. BACKGROUND

A. Historical Background

Corporations that engage in third world development projects often encounter governments without democratic traditions and Western notions of human rights. Often, natural resources are a prime source of potential revenues for developing countries. Most likely, the resource will be developed through a joint venture between a multinational corporation and the foreign government.

Multinational corporations fear that they may be held legally responsible for the acts of the sovereign government through no direct fault of the corporation. Such a fear was realized with the decision in *Doe v. Unocal*. The court failed to recognize that the remedies available to the corporation as against the sovereign are non-existent: the government dictates, therefore it is. As such, the corporation has limited ability to alter this relationship. Absent governmental prohibition against conducting business in or with a foreign government, U.S. companies should be free to do business with the government. At some point the liability of the corporation

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9. See Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth*, 75 A.J.I.L. 437, 449 n.61 (1981) (discussing how every state has sovereignty over its natural resources, as well as any exploitation or economic gain derived from them). On the international level, developing countries have used this as a reason to be excused from state responsibility under international law. *Id.* at 449 n.62.
10. Leebron, *supra* note 3, at 340. Leebron suggests several reasons that a host country (the foreign government) would want to create a joint venture with an outside multinational. *Id.* The host country may want to have continual monitoring and participation in decisions which may have ramifications in its country; the host country may want to have access to the superior information gathering skills of the multinational; and it may want to expropriate the investment. *Id.* at 340-41.
11. See *infra* part III.C.2. (discussing application of the Alien Tort Claims Act to private companies for torts committed by foreign government).
12. See *infra* part III.C.2. (describing how Unocal, a private company, is not immune from suit under the Alien Tort Claims Act for torts committed by foreign government).
13. See Leebron, *supra* note 3, at 311-12. Leebron discusses how a state commitment may not be "credible" since a state can choose to not enforce its own commitment. *Id.* at 311. The article also points out how a state can simply choose to change the rules of the game, since it is the sole force of law within its territory. *Id.* at 312.
under American tort law must have its limit. Such limits should not be defined by radical expansion of existing liability acts such as the Alien Tort Claims Act. The proper remedy lies in the political determination that the activities of the foreign government are so oppressive that U.S. businesses are denied any opportunity to conduct business with that nation. 4

B. Development of Alien Tort Claims Act

The Alien Tort Claims Act (ATCA), enacted in 1789, has rarely been used as a basis for liability. 5 The Act provides federal jurisdiction for the adjudication of claims alleging torts committed against aliens (i.e., non-U.S. citizens) in violation of the law of nations. 6 The United States Supreme Court has yet to give a definitive interpretation of the statute, and there exists a paucity of cases in the lower courts. 7 Courts have generally held that commonly recognized violations of the law of nations are actionable under the Act. 8 Courts tended to focus on the types of violations of international law actionable under the ATCA, rather than on the liability of private actors for such wrongs.

The Second Circuit in 1980 first recognized jurisdiction for torture under the ATCA in Filartiga v. Pena-Irala. 9 The court extensively analyzed the definition of the “law of nations,” and concluded that official torture perpetrated under color of law violated the law of nations. 10 The same circuit in a 1995 decision, Kadic v. Karadzic, 11 focused primarily on the requirement of state action in violating the law

14. See generally, MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE (1990 & Supp. 1996) (stating that the imposition of sanctions against such governments has been a long-standing tool of American domestic and foreign political policies to bring about democratic reforms). For example, sanctions have been used effectively against oppressive governments in China and South Africa. Id. Limited U.S. sanctions were imposed on Myanmar which prohibited new investment by U.S. persons, but not by foreign subsidiaries of U.S. persons. Id. See Executive Order No. 13,047, 62 Fed. Reg. 28, 301 (1997); see also infra Part IV.D. (discussing the executive and legislative response to the situation in Myanmar).

15. Kadid v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995). The Act has not been widely used because the statute requires “violation of the law of nations” as a threshold matter. Filartiga v. Pena-Irala, 630 F.2d 876, 887-88 (2d Cir. 1980), cert. denied, 442 U.S. 901 (1996). Many earlier cases did not involve well-established norms of international law and hence were dismissed. Id. In addition to Filartiga, only two other cases have not been dismissed for lack of subject matter jurisdiction. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 793 (D.C. Cir. 1984) (Edwards, J., concurring) (discussing the application of the ATCA in these two other cases -- Bolchos v. Darrel, 3 Fed. Cas. 810 (D.S.C. 1795) and Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961)).


19. Id. at 871. In Filartiga, the court found jurisdiction under the ATCA when the Inspector General of the Paraguayan Police tortured and killed the son of a political dissident. Id.

20. Id. at 880. The law of nations is said to consist of customs and usages of civilized nations, which are interpreted through the works of jurists and commentators, as well as judicial decisions recognizing such laws. Id. The court remarked that the standard of having the assent of “civilized nations” is a high one to prevent the idiosyncratic application of rules upon nations. Thus, since “torture” is uniformly condemned by all nations, it is a generally accepted usage or custom. Id. at 881.

of nations. The court made a "particularized examination of [the] offenses," in order to determine whether a violation of the law of nations could be committed by a private actor. The court applied an analysis similar to that of a 42 U.S.C.A. § 1983 claim to determine state action. Under such analysis, "a private individual acts under color of law within the meaning of § 1983 when he acts together with state officials or with significant state aid." The court concluded that Karadzic, as President of Srpska, a Bosnian-Serb republic, was liable to the plaintiffs (citizens of Srpska) for torts committed by military forces. The court held that as President, Karadzic ultimately commanded the military, and thus the military tortfeasors acted with "state aid."

In Doe v. Unocal, Unocal’s liability under the ATCA turned on the court’s interpretation of Unocal’s status as a “state actor” for purposes of the Act. As will be discussed infra, this determination has startling ramifications for multinational companies doing business in third world nations, where oppressive governments are common.

C. Development of Foreign Sovereign Immunities Act and Act of State Doctrine

Enacted in 1976, the Foreign Sovereign Immunities Act (hereinafter “FSIA”) grants immunity to foreign states from jurisdiction of federal and state courts in the U.S., subject to several exceptions. One commonly invoked exception is the “commercial activity” exception, which provides that a foreign state loses its immunity from suit in a United States’ court if it engages in commercial activity, i.e., the state in effect acts as a market participant. The court in Unocal concluded that the

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22. Id. at 241.
23. Id. at 241-44. The court methodically considered each genre of liability. Id. It concluded that private individuals may be held liable under the ATCA for genocide and war crimes but agreed with the Filartiga court that torture and execution require state action. Id.
24. Id. at 244.
27. Id. at 237. For an excellent discussion of Kadic and the expansion of the ATCA, see Alan Frederick Enslen, Commentary, Filartiga’s Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with its Decision in Kadic v. Karadzic, 48 ALA. L. REV. 695 (1997).
28. More than one-third of the world’s governments engage in, condone, or encourage torture. Hundreds of thousands of people have been killed by such practices, and thousands more have been intimidated into silence. 126 CONG. REC. E1444 (daily ed. April 24, 1991) (statement of Hon. Gus Yatron).
29. 28 U.S.C.A. §§ 1604-1605 (West 1997). The exceptions to immunity include: waiver of immunity, § 1605(a)(1); commercial activity, § 1605(a)(2); property taken in violation of international law, § 1605(a)(3); inherited, gift, or immovable property in the United States, § 1605(a)(4); noncommercial torts occurring in the United States, § 1605(a)(5); and maritime liens, § 1605(b). The sole basis for obtaining jurisdiction over foreign states in United States courts is through this statute. Republic of Arg. v. Weltover, 504 U.S. 607, 611 (1992).
plaintiffs' action was not based on the commercial activity of SLORC, MOGE and Unocal, and thus preserved the foreign government’s immune status.31

Similar to the FSIA, the Act of State doctrine grounds in the principle of separation of powers. The Act of State doctrine is a judicial recognition that courts should not decide cases which have vast foreign policy implications, since the Executive and Legislative branches are Constitutionally endowed with such power.32 The Unocal court concluded that the doctrine did not bar justiciability in this case largely because of its determination that Myanmar had no recognizable right to torture its citizens.33

III. THE CASE

A. The Facts

Doe plaintiffs filed a class action suit against Unocal Corporation (Unocal), its President and Chief Executive Officer, Total S.A., the Myanma Oil and Gas Enterprise (MOGE), and the State Law and Order Restoration Council (SLORC).34 The oppressive government, SLORC, and the state-owned Myanma Oil and Gas Enterprise, MOGE, created a joint venture with Unocal to build a gas pipeline, the “Yadana gas pipeline project.”35 The project was instituted to transport gas and oil from the sea to the Tenasserim region of Myanmar.36 The joint venture agreement provided that SLORC and MOGE would provide labor and security, as well as clear the way for the pipeline.37 The plaintiffs alleged that SLORC and MOGE used forced relocation and forced labor in contravention of the law of nations to achieve these ends.38 Additionally, SLORC and MOGE were accused of rape and torture of the women left behind in the villages after the men were taken away into forced labor.39

31. See infra notes 63-75 and accompanying text (examining the commercial activity exception under FSIA).
32. See U.S. CONST. art. II, § 2, cl. 2 (giving executive branch power to make treaties and nominate and appoint various officials); see also U.S. CONST. art. I, § 8, cl. 3 (giving power to Congress to regulate foreign commerce to legislative branch); see also Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 404 (1990) (describing the act of state doctrine “as a consequence of domestic separation of powers”).
34. Id. at 883.
35. See id. at 884-85 (considering Unocal’s 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and as such all facts alleged are considered in a light most favorable to plaintiffs). Thus, any discussion of facts from the Unocal case are based upon as yet unproven allegations. Id. at 885.
36. Id. at 883.
37. Id. at 896.
38. Id. at 885, 896.
39. Id. at 884.
B. Procedural Aspects

The plaintiffs alleged that violations of international law committed by SLORC and MOGE were committed for the benefit of the joint venture with Unocal, and sought damages in nineteen causes of action. The court considered Unocal’s motion to dismiss for lack of subject matter jurisdiction, failure to join a party, and failure to state a claim upon which relief could be granted. The court granted the defendant’s motion in part, and denied it in part.

C. The Opinion

The court’s opinion concerned three fundamental issues. In determining whether the court had subject-matter jurisdiction, the court first considered whether SLORC and MOGE were immune from liability under the FSIA; second, whether Unocal was liable under the ATCA; and finally, whether the Act of State doctrine applied to bar adjudication of the complaint.


The court first considered SLORC’s and MOGE’s liability in light of the FSIA. The FSIA provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States,” subject to exceptions set forth in 28 U.S.C.A. §§ 1605 through 1607. The defendant claiming immunity bears the burden of proving that it is a sovereign state. The burden of production then shifts to plaintiff to allege facts which would provide jurisdiction by falling under one of the exceptions. Once this is accomplished, the burden shifts back to the defendant to show that the exception does not apply. Thus, SLORC and MOGE bore the

40. Id. at 883.
41. Unocal Corp., 963 F. Supp. at 883. The causes of action were (1) violation of RICO; (2) forced labor; (3) crimes against humanity; (4) torture; (5) violence against women; (6) arbitrary arrest and detention; (7) cruel, inhuman or degrading treatment; (8) wrongful death; (9) battery; (10) false imprisonment; (11) assault; (12) intentional infliction of emotional distress; (13) negligent infliction of emotional distress; (14) negligence per se; (15) conversion; (16) negligent hiring; (17) negligent supervision; (18) violation of California Business & Professions Code §17200, and (19) injunctive and declaratory relief. Id. at 883-84.
42. Id. at 884.
43. Id. at 883.
44. Id. at 885-86, 889-90.
45. 28 U.S.C.A. § 1604 (West 1997). For a complete list of the exceptions, see supra note 29.
46. See Unocal Corp., 963 F. Supp. at 886 (citing Phaneuf v. Republic of Indon., 106 F.3d 302, 306 (9th Cir. 1997) which held that defendant bears the burden of establishing its immunity and that no exception applies). The court also says that a “public act” is not required to establish jurisdiction under the Act. Id.
47. Phaneuf v. Republic of Indon., 106 F.3d 302, 307 (9th Cir. 1997).
48. Id.
burden of proving that they were a foreign state; however, plaintiffs conceded this point. The burden of production to show an exception shifted to plaintiffs; however, as discussed infra, plaintiffs' allegations were not sufficient to fall within an exception, and thus they failed to meet their burden.

The commercial activity exception most concerned the Unocal court. The commercial activity exception prevents immunity where the action is based upon a commercial activity carried on in the U.S. by the foreign state; upon an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the U.S. Plaintiffs alleged that SLORC and MOGE fell under the second and third clauses of this exception.

The second clause of 28 U.S.C.A. § 1605(a)(2), in addition to requiring a showing of a commercial activity, discussed infra, requires plaintiffs to show that the claim is "based upon an act performed in the U.S." The court explained that a "plaintiff's claim is 'based upon' those activities that are elements of the claim that would entitle the plaintiff to relief." In Unocal, the Doe plaintiffs based their allegations on torts committed by SLORC and MOGE, not the commercial aspects related to the Yadana gas pipeline project. The second clause further requires performance of the commercial acts on which the complaint is based to be "performed in the U.S." The court remarked that the acts which constitute plaintiffs' tort claims were performed in Myanmar, not in the U.S., and thus summarily disposed of the second clause of 28 U.S.C.A. § 1605(a)(2).

The court moved on to the third clause of 28 U.S.C.A. § 1605(a)(2). The third clause requires that where the act occurs outside the U.S. in connection with a commercial activity of the foreign state, the act must cause a direct effect in the U.S. The court initially seemed satisfied that the clause was met as the acts (torts by SLORC and MOGE) occurred outside the U.S. (in Myanmar), and were per-

49. Under the definitions of FSIA, "foreign state" includes a political subdivision of a foreign state, or an agency or instrumentality of a foreign state. 28 U.S.C.A. § 1603(a) (West 1997).
51. Id.
55. See Unocal Corp., 963 F. Supp. at 887 (quoting from Holden v. Canadian Consulate, 93 F.3d 918, 920 (9th Cir. 1996) cert. denied, 117 S.Ct. 767 (1997)).
56. Id.
59. Id. at 888.
formed “in connection with” a commercial activity of the foreign state (the Yadana gas pipeline project). The court examined the acts to determine if they constituted “commercial activity” under the Act.

Abundant case law fleshes out the definition of “commercial activity” as used in the FSIA. Pursuant to its statutory definition, “commercial activity” means “either a regular course of commercial conduct or a particular commercial transaction or act,” with the commercial character of the activity being determined by the nature of the conduct, rather than its purpose. In determining whether the commercial activity exception applies, courts characterize how the foreign state participates in the marketplace—as a market participant or a market regulator. The Supreme Court interpreted the “commercial activity” exception to have the same definition as the restrictive theory of sovereign immunity, a theory used prior to passage of the FSIA. Under this definition, a foreign state is immune to sovereign or public acts (jure imperi), but not those that are private or commercial in character (jure gestionis). Thus, if a foreign state acts as a private player in the marketplace exercising powers similar to those exercised by private citizens, the foreign state is considered to have engaged in “commercial activity” for purposes of the FSIA exception.

The statute further provides that the nature of the act rather than its purpose determines the commercial character of the act. Thus, the inquiry is “whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce.’” The court in Unocal determined that though SLORC and MOGE parti-

62. Id. at 887-88.
63. See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (explaining that commercial activity is not found where public hospital employer turns employee over to government police to be tortured); see also Republic of Arg. v. Weltower, 504 U.S. 607 (1992) (holding that issuance of bonds is commercial activity); see also Adler v. Fed. Pub. of Nig., 107 F.3d 720 (9th Cir. 1997) (deciding that entering an agreement for consideration constitutes commercial activity); see also Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996) (holding that employment of diplomatic, civil service or military personnel is governmental and the employment of other personnel is commercial) cert. denied, 117 S.Ct. 767 (1997); see also Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992) (finding commercial activity where Argentina managing an Argentine corporation, operating a hotel, and receiving profits from its operations).
64. 28 U.S.C.A. § 1603(d) (West 1997).
67. Id.
68. Id.
70. Republic of Arg. v. Weltower, 504 U.S. 607, 614 (1992). The court provides an example which makes this distinction clear. Id. A foreign state’s issuance of regulations limiting foreign currency exchange is sovereign, since a private party cannot participate in this activity; in contrast, a foreign state’s entering a contract to purchase army boots is a commercial activity, since such an activity can be performed by private parties as well. Id.
icipated in the market for profit motives, such motives were irrelevant. The court instead should look to the nature of the actions complained of and ascertain if they are capable of being performed by a private actor. Here, the complaint alleged torts committed by SLORC military and police officials in furtherance of the Yadana gas pipeline project. The Supreme Court has held that "exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce." Thus, the torts are not a "commercial activity" within the meaning of the statute.

The court next focused on the statutory construction of "in connection with." Courts have interpreted the phrase to mean that the acts complained of have some "substantive connection" or "causal link" to the commercial activity. The phrase manifests an intentional difference between the first clause, and the second and third clauses, of 28 U.S.C.A. § 1605(a)(2). While the first clause requires a suit to be "based upon" a commercial activity, the second and third clauses merely require a suit to be "based upon acts performed 'in connection with' such activity." The Unocal court noted that SLORC and MOGE's actions satisfied the "in connection with" requirement of 28 U.S.C.A. § 1605(a)(2), since allegations of torture and expropriation of property are "substantively connected" to the Yadana gas pipeline project, the commercial activity.

Further, the court found the third clause of 28 U.S.C.A. § 1605(a)(2) did not apply as an exception to immunity because the acts caused no "direct effects" in the United States, as required by the statutory language. An act meets this requirement if "it follows as an 'immediate consequence' of the defendant's activity." The court found plaintiffs' alleged chain of causation too attenuated to be considered a direct effect for purposes of the statute. The plaintiffs suggested that forced labor and relocation reduced the project cost, thus providing SLORC and MOGE with a

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72. Id.
73. Id. at 888.
75. Id. at 888. See infra part IV.B. (discussing effect of finding no commercial activity).
76. Unocal Corp., 963 F. Supp. at 888 n.5.
77. See Unocal Corp., 963 F. Supp. at 888 (citing Adler v. Fed. Republic of Nig., 107 F.3d 720, 726 (9th Cir. 1997)).
80. Unocal Corp., 963 F. Supp. at 888 n.5. The court makes this conclusory statement with no analysis. Id.
competitive advantage in the gas market in the United States. The court noted that mere financial loss does not establish a direct effect. Thus, the commercial activity exception did not apply to SLORC and MOGE, and the FSIA provided them with immunity.

2. Unocal Not Immune from Suit Under Alien Tort Claims Act

The Alien Tort Claims Act confers upon U.S. district courts original jurisdiction in any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. The plaintiffs allege that torts committed by private defendants may be based on violations of international law. The court noted that it "must determine 'whether there is an applicable norm of international law, whether it is recognizable in the United States, what its status is, and whether it has been violated.'"

The "law of nations" has been subject to differing interpretations. The law of nations may be determined by looking to writings on public law, the general practice of nations, and judicial decisions enforcing international law. Most courts agree that its definition derives from the contemporary international community and

84. Id.
85. Unocal Corp., 963 F. Supp. at 888. See Siderman de Blake v. Republic of Arg., 965 F.2d 699, 710 (9th Cir. 1992). Several circuits have adopted the "legally significant acts" test to determine a direct effect for purposes of clause three of § 1605(a)(2). Adler v. Federal Republic of Nig., 107 F.3d 720, 727 (9th Cir. 1997). In applying this test the court looks to the place where the legally significant acts giving rise to the claim occurred to determine the place where the direct effect is located. Id. However, this test has not been expressly adopted by the Supreme Court. Republic of Arg. v. Weltover, 504 U.S. 607, 618. Rather, the Court outlined an "immediate consequences" test. Id.
86. Unocal Corp., 963 F. Supp. at 888.
89. See Unocal Corp., 963 F. Supp. at 890 (quoting from In Re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 502 (9th Cir. 1992)).
90. See Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988) (recognizing that defining "the law of nations" is the subject of hot debate); see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (citing The Paquete Habana, 175 U.S. 677, 700 (1900)). The Supreme Court has stated that in determining the "law of nations," where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.
Id.
The court first decided whether the ATCA incorporates a state action requirement. The court analyzed when actions by a private individual may be deemed actions of a state, assuming without explanation that there is some such requirement. While the Supreme Court provides four approaches to determine state action, each court makes a fact-based inquiry to determine which one(s) to apply. The Unocal court adopted the joint action approach, wherein private actors are state actors if they are "willful participants in joint action with the state or its agents." Under the joint action test, courts alternatively have examined whether state officials and private actors "acted in concert in effecting a particular deprivation of constitutional rights," or whether the state and private actors "share a common, unconstitutional goal." Thus, where a "substantial degree of
cooperative action" exists between state and private actors, state action is present. In Unocal, plaintiffs alleged that Unocal worked in concert with SLORC and MOGE pursuant to the Yadana gas pipeline agreement and were aware of and benefited from the alleged human rights violations. This sufficiently confers subject matter jurisdiction under the ATCA against the private defendants.

The court next considered potential private liability in the absence of state action. Recognizing this as an unsettled area of the law, the court decided that violations of some international laws are not limited to state actors, but may be violated by private parties as well. The Unocal court analogized allegations of forced labor to slave trading, which give rise to a violation of international law capable of being perpetrated by private individuals. The court reasoned that since Unocal paid SLORC to provide labor and security for the Yadana project, it in effect accepted and approved the use of slave labor. Therefore the court recognized jurisdiction against the private defendants under the ATCA.

3. The Act of State Doctrine Not a Bar to Plaintiffs Claims.

After disposing of jurisdictional issues, the court next turned to a prudential concern, the Act of State doctrine. The Act of State doctrine represents judicial concern with "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." The Unocal court stated that the doctrine "is limited to situations in which 'the relief sought or the defense interposed require a court in the U.S. to declare invalid the official act of a foreign sovereign performed within its own territory.'" Drawing from Ninth Circuit dicta, the court held that the doctrine’s application is inappropriate unless adjudication of the matter will clearly bring the nation into hostile confrontation with the foreign state. The court concluded that adjudication

102. Id. (citations omitted).
103. Id. at 885.
104. Id. at 891.
105. Id.
106. Unocal Corp., 963 F. Supp. at 891-92. To be considered a state under international law, there must be a people, a territory, and a capacity to enter into relations with other states. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring). Thus, even if a government is not recognized as a state by the United States, it may still be recognized under this definition. Id.
109. Id.
110. Id.
113. See id. (citing Republic of Phil. v. Ferdinand Marcos, 862 F.2d 1355, 1360 (1988)).
of the claim is unlikely to lead to hostile confrontation with SLORC since the Executive and Legislative branches have already expressed their displeasure over human rights abuses.\footnote{Id. The court noted that the President had issued an Executive Order recognizing human rights abuses in Myanmar and prohibiting new investment there. \textit{Id. See infra} part IV.D. (discussing the executive and legislative response).}

The court next considered "whether the foreign state was acting in the public interest."\footnote{See \textit{Unocal Corp.}, 963 F. Supp. at 893 (quoting from Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989)).} Sovereigns have exclusive control over their natural resources.\footnote{Burns H. Weston, \textit{The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth}, 75 A.J.I.L. 437, 449 n. 61 (1981).} The court recognized that the abuses are "connected to decisions regarding allocation and profit from Burma's national resources."\footnote{\textit{Unocal Corp.}, 963 F. Supp. at 893.} Despite these principles, the court dismissed any argument that SLORC's and MOGE's international human rights abuses are matters in the public interest. The court continued its analysis by pointing out that since human rights abuses are internationally denounced, the foreign state has no authority to claim such acts as "acts of state."\footnote{\textit{Id.} at 894.} Therefore the Act of State doctrine did not apply.\footnote{\textit{Id.} at 895.} Still, the court ruled the plaintiffs may only reach the non-state defendants since SLORC and MOGE have sovereign immunity.\footnote{\textit{Id.} at 893.}

\textbf{D. Conclusions}

The \textit{Unocal} court had subject-matter jurisdiction under the ATCA as against defendant Unocal, while it lacked jurisdiction under the FSIA as against SLORC and MOGE.\footnote{See supra notes 44-109 and accompanying text (interpreting the \textit{Unocal} court's opinion regarding jurisdiction under ATCA and FSIA).} The court found further that the Act of State doctrine did not bar adjudication of plaintiff's claims.\footnote{See \textit{supra} notes 110-20 and accompanying text (noting the \textit{Unocal} court's decision with regard to application of the Act of State doctrine).}

The court had valid jurisdiction under the ATCA since the plaintiffs met the statutory requirements. The plaintiffs were aliens, alleging torts, in violation of international law.\footnote{See \textit{supra} note 89 and accompanying text (quoting statutory requirements to state a claim under ATCA).} In so holding, the court determined that Unocal, a private company, could violate international law.\footnote{See \textit{supra} notes 105-109 and accompanying text (relating the \textit{Unocal} court's discussion of private actor's liability for violations of international law absent state action under ATCA).} Thus, the court found a minimal
requirement of state action. Further, its holding required a foundational interpretation that allegations of forced labor were equivalent to slave trading.125

The court's conclusion that SLORC and MOGE were immune from suit under the FSIA rested on its determination that their joint venture with Unocal and the torts arising from the venture did not sufficiently establish a "commercial activity" and thus come under an exception to the Act.126 Of primary importance was the determination that the venture caused no direct effects in the U.S.127 Finally, the court held that the Act of State doctrine did not bar adjudication of plaintiffs claim as Myanmar had no sovereign right to torture its citizens.128

The court summarily noted that though SLORC and MOGE are immune from suit under FSIA, they are not indispensable parties.129 As long as plaintiffs can prove that Unocal, and SLORC and MOGE, are joint tortfeasors, relief still may be accorded through the parties remaining in the suit.130

III. LEGAL RAMIFICATIONS

A. Unprecedented Expansion of Alien Tort Claims Act

1. Foreign Policy Implications

Much of the world must face limited politico-judicial protections, particularly citizens of third world nations.131 A developing nation, usually bereft of economic activity, and hence of tax revenues, typically possesses neither the capital nor the technological expertise to develop its natural resources.132 Recognizing this, developing countries use economic incentives and market principles to attract direct foreign investment ("DFI").133 For the host nation such investment generates hard currency, provides jobs for its citizens, and usually provides for an export com-

125. See id.; see also infra part IV.A.2. (discussing the implications of expanding the ATCA find a private party acting under color of law by participating in a joint venture with a foreign state).
126. See supra notes 63-75 and accompanying text (examining the commercial activity exception under FSIA).
127. See supra notes 81-86 and accompanying text (defining "direct effect" under FSIA).
128. See supra notes 115-19 and accompanying text (discussing Unocal court's determination that the Act of State doctrine did not apply).
130. Id.
131. See David Ziskind, The Labor Laws of the Third World, 1 COMP. LAB. L. 59, 62-65 (1976) (describing characteristics that many third world countries share, for example, extensive poverty, high population growth, and authoritarian government).
132. Id.
133. See Ellinidis, supra note 2, at 307 (describing DFI as the "most expedient and efficient method to benefit [a] growing economy").
modesty. Moreover, without such investment, such nations would go largely undeveloped, leaving their people in economic despair.

Incentives manifest in a variety of forms. First, many nations provide for expatriation of profits, wherein the foreign investor can take his profits out of the country with minimal restrictions. Second, many nations provide favorable tax treatments, including exemptions or tax-free interest loans to attract DFI. Finally, developing nations vary in their approach to labor requirements for foreign investors.

With this background in mind, expansion of the ATCA to hold private companies liable for torts committed by a foreign government places U.S. multinational corporations at a distinct disadvantage. While ostensibly allowed to participate in the economic affairs of the third world nation (i.e., no adverse State Department or congressional prohibitions), the multinationals now must shoulder the added burden of exposure to tort liability for their participation.

Unocal would require U.S. district court judges to enter the foreign policy arena, dictating by judicial decision and certainly not by reasoned foreign policy goals. The multinational corporation must choose to either participate in the development of a third world nation with the potential for liability for tortious acts committed by the government, or to not participate at all.

2. Legal Reasoning Implications

Unocal provided jurisdiction under the ATCA against Unocal based on its definition of "state actor." The "state action" requirement under the ATCA is the same as the "under color of law" requirement of § 1983 claims. To state a claim under § 1983, a plaintiff must show (1) the defendant deprived him of a constitutionally or statutorily protected right; and (2) the defendant deprived him of this right by acting "under color of law." Acting "under color of law" is conduct

134. INGRID DETTER DE LUPIS, FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES 51-54 (2d Ed. 1987).
135. See Ellinidis, supra note 2, at 307-08 (stating that economic growth stimulated by DFI benefits the host country's standard of living, as well as increases the skills of the local labor force).
137. Id. at 16.
138. Id. at 18.
139. Id. While some countries are more restrictive and require all employees to be local citizens, other countries have more relaxed policies and allow specialized employees to be brought in and have a policy giving preference to locals when they meet the investors criteria. Id. at 21.
140. See supra notes 96-109 and accompanying text (outlining the requirement, or lack thereof, for state action in finding liability for violations of international law under ATCA).
142. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982) and United States v. Price, 383 U.S. 787, 794 n.7 (1966) (stating that the "under color of law" language and the "state action" language have been subject to the same analysis by the courts).
performed by a private party with significant state aid or in conjunction with state officials. In *Unocal*, the plaintiffs did not allege that Unocal or its employees or executives participated in the forced labor, only that Unocal's joint venture agreement obligated SLORC to provide labor for the Yadana gas pipeline project. Such an arrangement is common in joint ventures with underdeveloped nations in the development of the host nation's national resource, as discussed *supra*.

More disturbing still is the surprising alacrity and lack of sound legal reasoning from which the court jumps from forced labor to slave trading. The court recognized that private individuals are not liable for torture under international law, while they may be liable for slave trade. The court then concludes that allegations of forced labor are sufficient to find slave trading. Slave trading is defined as the "buying and selling of slaves for profit." Despite this definition, the court recognized that there are no allegations of "physically selling Burmese citizens to the private defendants." The entire basis for recognizing jurisdiction against Unocal under the ATCA thus rests on the court's finding that forced labor is equivalent to slave trading, even absent allegations of selling or buying citizens. This is an example of an activist court searching to find liability for aggrieved plaintiffs and distorting the facts and the law to fit that aim.

**B. Finding of No Commercial Activity Under Foreign Sovereign Immunity Act Insulates Myanmar Government from Liability**

The court found SLORC immune from liability in United States courts under the FSIA by concluding that SLORC is not participating in a commercial activity. A finding that SLORC engaged in a commercial activity would encourage oppressive governments to act more humanely. Unfortunately, in *Unocal*, SLORC would still not fall within the commercial activity exception since there were no direct effects in the U.S.

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144. Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995). See *supra* notes 96-103 and accompanying text (discussing state action requirements).
145. *Id.* at 885.
146. See *supra* notes 3, 9-10 and accompanying text (describing common business arrangements in developing countries).
148. *Id.* at 892.
149. *Id.*
152. See *infra* notes 166-67 and accompanying text (maintaining that the *Unocal* court is selectively characterizing alleged torts to fit desired outcome).
153. *Unocal Corp.*, 963 F. Supp. at 888, 893. See *supra* notes 63-75 and accompanying text (examining the commercial activity exception to FSIA and its application to facts of *Doe v. Unocal*).
Saudi Arabia v. Nelson supports an interpretation finding commercial activity. There, the concurring justices found a commercial activity in the operation of a public hospital. Here, commercial activity could be found in the joint operation of the pipeline development project between SLORC and Unocal. The Nelson concurrence drew support from House and Senate reports accompanying the FSIA legislation, which stated that "a foreign government's...employment or engagement of laborers...would be among those included within' the definition of commercial activity." The drafters clearly intended to deny immunity based on facts found in Unocal. Essentially SLORC used its sovereign position to shift responsibility to the private party. Nevertheless, since there is no direct effect in the U.S., SLORC and MOGE avoid responsibility.

Additionally, there is a flaw in the courts "direct effects" analysis, though not in its result. The Unocal court properly adopted the immediate consequences test outlined by the Supreme Court in Republic of Argentina v. Weltover, though it also used language from the "legally significant acts" test. In Weltover, the Supreme Court held that to establish a "direct effect" there is no requirement of "substantiality" or "foreseeability." The FSIA merely requires that the effect follow "as an immediate consequence of the defendant's activity." However, the Unocal court went on to adopt a statement in Siderman de Blake v. Republic of Argentina which holds that "mere financial loss" is not enough to establish a direct effect. This statement does not necessarily follow under the immediate consequences test since it was derived from the substantiality or foreseeability test expressly rejected by the Supreme Court. In determining that the direct effect element is not satisfied, the court's reliance on the mere financial loss statement is inappropriate. The court should have analyzed the facts strictly under the immediate consequences test of Weltover. The court's confusion, while not affecting the outcome of the case, creates precedent founded on inaccurate application and interpretation of the tests.

Further evidence that the court selectively used facts to craft a particular result is evident in the different characterization of the alleged torts as against the governmental and private defendants. Under the FSIA, the court held that the "enslave[ment of] farmers" is carried out through SLORC's police power and is
thus “peculiarly sovereign in nature.” Conversely, under the ATCA, the court recognized slave labor as an international law which does not require state action and can be violated by private individuals. The *Unocal* court only aids SLORC’s attempt to shift responsibility to the private defendants by improperly characterizing the alleged torts.

C. Hostile Confrontation Requirement Unnecessarily Read into Act of State Doctrine

The court in *Doe v. Unocal* unnecessarily expanded the application of the Act of State doctrine. The Act of State doctrine’s purpose is to prevent justiciability of sovereign acts of foreign states in U.S. courts, thereby promoting separation of powers. The judicial department thus properly defers foreign policy functions to the executive and legislative branches.

The Act of State doctrine recognizes that the courts neither belong, nor are qualified, to act in the political arena. There is much more to an analysis of the ramifications of such adjudication than the district court seems fit to interpose. The *Unocal* courts’ adoption of Ninth Circuit dicta, and further extrapolation from it, whereupon it imposes a “hostile confrontation” requirement, has no precedent, nor is it required to achieve the same result. The *Unocal* court construes foreign policy so narrowly that only the threat of a military or a similarly hostile response would preclude adjudication of foreign state acts in U.S. courts. The analysis is predicated on the simple but grossly misguided question of whether or not adjudication would give rise to “hostile confrontation.” The *Unocal* court’s decision will do more harm to the long term interests of the U.S., its companies and its people, than any intended good for the aggrieved individuals of the third world nation.

164. *Id.* at 890-92.
165. *See supra* note 160 and accompanying text (emphasizing that foreign states should take responsibility for their actions in violation of international law).
166. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 802 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the Supreme Court has recognized that a primary reason for the doctrine is the separation of powers.
167. *See id.* (Robb, J., concurring) (stating “The conduct of foreign affairs has never been accepted as a general area of judicial competence.”). *But see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (recognizing that it may be appropriate for courts to act if faced with a matter on which there is international consensus, as the court will be able to apply solid principles).
169. *Id.*
170. *Id.*
The executive and legislative branches have responded to the situation in Myanmar. In recognition of the human rights abuses by SLORC, President Clinton signed an executive order prohibiting new investment in the country.\textsuperscript{171} Uncertainty exists as to whether current business projects may continue, or whether all new investment is prohibited.\textsuperscript{172} The U.S. historically used such measures when a government's policies are antithetical to democratic notions espoused by the U.S.\textsuperscript{173} Sanctions have effectively been used against South Africa, China, and a host of other governments with histories of subverting democracy.\textsuperscript{174}

The federal government is not alone in implementing sanctions against Myanmar. Municipalities and states are becoming pro-active, apparently dissatisfied with U.S. foreign policy.\textsuperscript{175} Many have enacted various "selective purchasing agreements" and boycotts of companies doing business with Myanmar.\textsuperscript{176} Most states find that leveling sanctions is effective. Sanctions usually consist of a "selective purchasing law" whereby the government refuses to do business with a company or a country that invests or does business in a particular nation.\textsuperscript{177}

While these types of boycotts, sanctions, and official condemnations are valuable to express outrage at SLORC's oppressive practices, they do not improve the political conditions for the citizens of Myanmar. One way to encourage democratic reforms within Myanmar and other oppressive governments is to encourage

\textsuperscript{172} Of particular concern to businesses investing in southeast Asia is that Myanmar recently became a member of ASEAN, the Association of Southeast Asian Nations. BBC Summary of World Broadcasts, Burma Admitted to ASEAN, Foreign Minister signs Protocol, July 25, 1997. Therefore, doing business in any member state of ASEAN may involve some type of "new investment" in Myanmar, and may be prohibited under the order. Evelyn Iritani, Some See Wide Net Cast by Ban on Myanmar, L.A. TIMES, May 24, 1997, at D1.  
\textsuperscript{173} MALLOY, supra note 14, at 626-27.  
\textsuperscript{174} See generally id. (discussing the effectiveness of economic sanctions).  
\textsuperscript{175} See David Schmahmann and James Finch, The Unconstitutionality of State and Local Enactments In the United States Restricting Business Ties with Burma (Myanmar), 30 VAND. J. TRANSNAT'L L. 175, 177 (1997) (mentioning several state municipalities and the acts they have taken in response to apartheid in South Africa, for example).  
\textsuperscript{176} Theo Emery, State with Foreign Policy Rolls Trade Beyond Seas, BOSTON GLOBE, Sept. 21, 1997, at D1.  
\textsuperscript{177} Eric Young, State Legislators Mull Economic Sanctions, SACRAMENTO BEE, Oct. 29, 1997, at C1. Exemplifying these efforts is a law recently enacted in Massachusetts which states that "a state agency, a state authority, the house of representatives or the senate may not procure goods or services from any person on the restricted purchase list." MASS. ANN. LAWS ch. 7, § 22H (Law. Co-op. 1997). The statute then specifies that "all persons currently doing business with Burma (Myanmar)" are to be on the list. Id. at § 22J. Citing this law as a factor, thirteen companies stopped doing business in Myanmar. Emery, supra note 176, at D1. Thus, it seems the businesses investing in these foreign countries have been responsive to these measures. Id. However, the intervention of states into the foreign policy realm is beginning to have an adverse effect. For example, the EU is now suing the United States, saying that Massachusetts' selective purchase law is in contravention of United States' obligations under its membership in the WTO. Id. Japan, EU Challenge Massachusetts' Law on Myanmar Trade, Asian Economic News, Oct. 6, 1997.
U.S. multinational corporations to invest in the country.\textsuperscript{178} The President exercised his executive powers in prohibiting "new" investment in Myanmar, which reflects intolerance of human rights abuses, while allowing existing businesses to continue influencing change internally.\textsuperscript{179} The President has at his disposal countless experts in the area of foreign policy upon which he bases his decision. Such tools are an invaluable resource in navigating the delicate waters of foreign policy. Without such tools the district court judge, relying on a law clerk and newly created precedent alone, may find himself conducting foreign policy by the hip of his casebook. That is not the proper exercise of judicial authority.\textsuperscript{180} This court exercised its judicial power in determining that private companies may be held to answer for tortious conduct of a foreign government joint venturer, a decision that may very well squelch "existing" investment in Myanmar. Thus the \textit{Unocal} court, too, exercised powers over foreign policy.

\textbf{IV. CONCLUSION}

Multinational companies already face the risks endemic to investing in a foreign nation with an authoritarian-type government.\textsuperscript{181} Under the reasoning adopted by the court in \textit{Unocal}, U.S. multinational corporations face an even greater risk in their home country. By simultaneously restricting application of the FSIA while expanding application of the ATCA, the court created a solution that does little to solve the underlying problem: torture and abuse of foreign citizens by their government.

The expansion of the ATCA to hold private parties responsible for official acts of a government it does business with is antithetical to Western notions of apportioning fault and liability. There were no allegations of Unocal employees encouraging or participating in the forced labor of Burmese citizens. The mere fact that such practices may have happened during performance of a contract with SLORC should not be enough to subject a U.S. multinational to liability. Entering a contract to develop a natural resource of a country is a commercial activity, and

\begin{itemize}
\item \textsuperscript{178} See \textit{Unocal Corp.}, 963 F. Supp. at 895 n.17 (recognizing that "the coordinate branches of government have simply indicated an intention to encourage reform by allowing companies from the United States to assert positive pressure on SLORC through their investments in Burma").
\item \textsuperscript{179} See supra notes 171-74, 178 and accompanying text (discussing President Clinton's Executive Order and determination to allow existing businesses to remain in Myanmar).
\item \textsuperscript{180} See \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774, 802-803 n.7 (D.C. Cir. 1984) (Bork, J. concurring) (discussing judicial abstention from foreign policy); see also \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J. concurring) ("[I]nternational 'law,' or the absence thereof, renders even the search for the least common denominators of civilized conduct in this area an impossible-to-accomplish judicial task").
\item \textsuperscript{181} See Ellinidis, supra note 2, at 310-12 (discussing the political, legal, and socio-cultural dangers faced by investors in third-world countries). Ellinidis also discusses specific risks multinational investors may face, such as political insurrection and inconvertibility of currency. \textit{Id.} at 313-16.
\end{itemize}
hence the government should not be shielded from liability under the FSIA or the Act of State doctrine.

The court's expansion of a private company's liability under the ATCA will add further risk to multinational corporations investing in third world nations. Encouragement of democratic reforms through direct foreign investment will lessen as the risks begin to heavily outweigh the benefits. The U.S. government effectively dealt with human rights abuses through implementation of economic sanctions. In the long run, this avenue offers the greater potential for success by involving a branch of government that can do something the district court cannot do: respond directly to the actions of the foreign nation.

182. See supra notes 171-74 and accompanying text (noting implementation of sanctions against Myanmar); see also Country Reports And U.S. Policies On Human Rights Practices For 1997, Before the Subcommittee On International Operations And Human Rights of the House International Relations Committee, February 3, 1998 (Prepared Testimony of John Shattuck, Assistant Secretary of State For Democracy, Human Rights And Labor) (providing an extensive debriefing about the steps that Congress and the Executive branch are taking to raise consciousness about human rights abuses).