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“There They Go Again”
**The Trial Bar’s Quest for
the Next Litigation Bonanza**

Arthur Fergenson

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NATIONAL
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Bridging Business and Government

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NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

1776 K Street, NW, 8th Floor
 Washington, DC 20006
 202-466-9360
 202-466-9366 *fax*
 E-mail: info@nlcpi.org

Please visit our web site at: www.nlcpi.org

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PREFACE

This important work by authors Arthur Fergenson and John Merrigan identifies a new threat—the trial bar’s emerging effort to subject U.S. and foreign corporations to massive new liabilities through foreign class actions.

As asbestos and other domestic sources of large-scale liability wind down, contingency fee law firms increasingly are looking abroad for opportunities to bring “global class actions” in U.S. courts. This monograph describes the trial lawyers’ strategy to convert the 200-year-old Alien Tort Statute (“ATS”) into a novel source of mass tort liability.

The authors note that plaintiff classes in recent ATS cases have numbered in the tens of thousands, rivaling in size the asbestos classes that bankrupted over 70 U.S. companies. These huge foreign classes will be impossible for U.S. courts to manage. Defendant class sizes have grown to 500 or more. Purported damages in a single case alone total \$400 billion.

The Supreme Court’s 2004 decision in *Sosa v. Alvarez-Machain* instructed lower federal courts to regard innovative ATS lawsuits with “great caution” and to conduct “vigilant doorkeeping” to reject ATS suits that lack any U.S. nexus and interfere with the conduct of U.S. foreign relations, as many recent ATS class actions do. The trial bar has vowed to “fight for our lives” to thwart *Sosa*.

This monograph describes how federal courts have applied *Sosa* thus far, how the trial bar has sought to exploit occasional openings to test the limits of post-*Sosa* ATS liability, how the executive branch has weighed in to protect its foreign policy prerogatives, and how events in recent cases may help potential defendants to protect against unprecedented ATS liability never intended by Congress.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of the law and its processes. The views expressed in this monograph are those of the authors and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center. The *Briefly...* booklets are designed to be short, insightful treatments of leading legal issues of interest to the private sector.

Richard A. Hauser
President, National Legal Center

INTRODUCTION

As the era of asbestos and tobacco class actions winds down, America's most aggressive class action law firms have in place a fee structure in search of an investment strategy. In their quest for ever-larger contingency fees, trial law firms have resorted to dramatic innovations. As the U.S. market for large-scale class actions has become more competitive, some of the firms have begun to specialize in lodging foreign contingency fee cases in U.S. courts. Of course, to maximize contingency fees, plaintiff class size matters. So leading contingency fee law firms have introduced a breathtaking concept: burdening U.S. courts with "global class actions," filed on behalf of thousands of foreign plaintiffs. To expand recoveries even further, the firms have begun aiming U.S. lawsuits at "defendant classes," some comprised of hundreds of deep-pocketed U.S. and foreign defendants, including heads of state, U.S. and foreign corporations operating abroad, and wealthy individuals.¹

Most recently, the trial lawyers have seized upon the 200-year-old Alien Tort Statute ("ATS") as a target of opportunity for a novel source of mass tort liability.

This is a startling development that the executive branch and courts must police with vigilance. The Supreme Court in *Sosa v. Alvarez-Machain*² commands dismissal by lower courts when ATS lawsuits interfere with foreign policy and thus run afoul of the political question doctrine.³ Nonetheless, the trial lawyers defiantly claim that they, through contingency fee lawsuits, are better suited than the U.S. Government to conduct the nation's foreign policy:

"If we left justice solely to the U.S. Government, when it has so many commercial and other interests . . . what action would be taken?"⁴

¹ By way of example, in *Khulumani v. Barclay Nat'l Bank* (consolidated with *In re South Af. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) [hereinafter *Apartheid Litig.*]), the law firm Cohen, Milstein, Hausfeld & Toll filed a suit on behalf of the Khulumani support group and its 32,700 members against 23 major corporate defendants, including International Business Machines Corp. and Ford Motor Co. Indeed, one of the complaints in the consolidated case estimated that "the class encompasses millions of individuals." *Apartheid Litig.* at 545 (citing *Ntsebeza v. Citigroup, Inc.*). Some other recent cases have named 200-500 defendants, as discussed below. Michael D. Goldhaber, *The Death of Alien Tort*, AMER. LAW., July 2006, at 71 [hereinafter *The Death of Alien Tort*].

² 542 U.S. 692 (2004) [hereinafter *Sosa*].

³ Courts may also dismiss cases involving foreign policy issues on such related abstention doctrines as international comity, *forum non conveniens*, and exhaustion of foreign remedies.

⁴ Jennifer Senior, *A Nation Unto Himself*, N.Y. TIMES MAGAZINE, Mar. 14, 2004, at 43 [hereinafter *A Nation Unto Himself*] (quote from Motley Rice co-counsel Allan Gerson).

A recent class action⁵ targeted over 200 deep-pocketed foreign defendants, prompting a former U.S. ambassador to call the purported litigation solution "the privatization of foreign policy."⁶ The plaintiffs' lawyers responded as follows:

"[The Ambassador's] notion, which represents institutionalized State Department dogma, is like the old idea that the Post Office is only something that the U.S. Government can do—it's so antiquated it's absurd."⁷

The trial lawyers are gravitating toward ATS class actions, recognizing that, if they can weather a dismissal motion in a single case, they might gain the ability to proliferate a succession of extra-territorial global class actions, which lack any nexus to the United States. The formation of these wholly foreign plaintiff classes, where tens of thousands of "claimants" would be drawn from jurisdictions in the far reaches of the globe, would be impossible for U.S. courts to manage adequately. If the contingency fee lawyers succeed through these ATS suits in positioning themselves as the arbiters of U.S. foreign policy, their novel lawsuits will subject U.S. and foreign corporations operating abroad and other defendants to extraordinary levels of global ATS class action liability never contemplated by Congress.⁸

ATS contingency fee trial lawyers have vowed not to be deterred by *Sosa*: "*Sosa* is the absolute beginning of the fight over the Alien Tort Statute. . . . We're going to fight for our lives."⁹ However, since the Supreme Court decided *Sosa* in June 2004, an encouraging trend is emerging in lower courts (with minor exceptions) toward enforcing the political question doctrine consistent with *Sosa's* heightened guidelines.

This monograph examines how the courts have begun to apply *Sosa's* guidelines in the context of the political question doctrine consistent with *Baker v. Carr*.¹⁰ In the rare instances thus far, where courts have misconstrued *Sosa's* guidelines, the monograph illustrates how the U.S. Government has responded promptly to ensure that harmful precedents are not set, and

that the courts do not revert to a pre-*Sosa* expansionist approach to the ATS. The study also reviews the growing tendency among lower courts to elicit the views of the executive branch in cases involving foreign relations pursuant to the Supreme Court's decisions in *Sosa* and *Austria v. Altmann*.¹¹ Finally, the monograph offers practical suggestions, based on events in recent cases, to prevent the trial bar from advancing their newly conceived and harmful global ATS class actions.

⁵ *Burnett v. Al Baraka Inv. & Dev. Corp.*, 2006 U.S. Dist. LEXIS 11741 (S.D.N.Y. 2006) [hereinafter *Burnett*].

⁶ *A Nation Unto Himself* at 43.

⁷ *Id.* (quote from Motley Rice co-counsel Allan Gerson).

⁸ In cases of this type, plaintiffs often seek a panoply of remedies, including compensatory and punitive damages, attorneys' fees, disgorgement of profits, declaratory judgments, injunctions, and other forms of equitable relief.

⁹ Quote from Paul Hoffman, a partner in Schonbrun DeSimone Seplow Harris & Hoffman. *The Death of Alien Tort* at 72.

¹⁰ 369 U.S. 186 (1962) [hereinafter *Baker*].

¹¹ 541 U.S. 677 (2004) [hereinafter *Altmann*].

A. The Alien Tort Statute (“ATS”)

The ATS provides: “The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.”¹²

The ATS was passed by the first Congress in 1789 and was intended to provide jurisdiction in U.S. federal court for victims of “offenses against ambassadors, violation of safe conducts, and piracy.”¹³

The ATS was moribund until 1980 when the United States Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Irala*,¹⁴ allowing suits alleging violations of “customary international law.”¹⁵ For the next 10 years, activists employed ATS lawsuits to highlight foreign human rights abuses, but collection of money damages was rare.

In the 1990s, contingency fee law firms joined activists to sue deep-pocketed corporations, alleging vicarious liability under the ATS. Many of these lawsuits were settled out of court. Meanwhile, trial lawyers started filing suits in search of sympathetic federal jurisdictions, ascribing legal standards so broad that the scope of exposure under the ATS would become virtually limitless.¹⁶

¹² 28 U.S.C. § 1350. In *Sosa*, the Court quotes Judge Henry Friendly, who “called the ATS a ‘legal Lohengrin . . . no one seems to know whence it came’ . . . and for over 170 years after its enactment it provided jurisdiction in only one case.” *Sosa* at 712 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

¹³ *Sosa* at 694.

¹⁴ 630 F.2d 876 (2d Cir. 1980).

¹⁵ *Id.* at 882.

¹⁶ See, e.g., *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

B. *Sosa v. Alvarez-Machain*: An Analytical Framework for ATS Cases and Application of the Political Question Doctrine

1. *Sosa* Imposes Heightened Restrictions on Lower Courts

In 2004, the U.S. Supreme Court heard its first ATS case and imposed a set of restrictive guidelines instructing courts to exercise “great caution” in entertaining ATS lawsuits.¹⁷ Among its other restrictions, the Court found that:

- The ATS is a jurisdictional statute that does not confer any independent cause of action;
- ATS jurisdiction can be invoked only to bring federal common law claims recognizing a very limited class of international law norms; and
- Courts should exercise particular care with respect to lawsuits alleging extraterritorial conduct because of the potential impact on U.S. foreign policy.¹⁸

The Court warned against “collateral consequences” that might spring from innovative causes of action under the ATS, including an adverse impact on foreign relations:

“The subject of those collateral consequences is itself a reason for a *high bar* to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts *particularly wary* of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”¹⁹

The Court’s admonition applies with particular strength with respect to lawsuits alleging conduct lacking any nexus to the United States:

¹⁷ *Sosa* at 728.

¹⁸ *Id.* See also *Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) [hereinafter *Arabian Am. Oil*] (“The presumption against extraterritoriality ‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’”)

¹⁹ *Id.* at 727 (emphasis added).

"It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold a foreign government or its agent has transgressed those limits."²⁰

Because "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences," the Court warned that "they should be undertaken, *if at all*, with great caution."²¹

The Court recognized the policy of "case-specific deference to the political branches" as limiting the availability of relief in federal courts for violations of customary international law and made clear in a rule of decision that "federal courts should give *serious weight* to the Executive Branch's view of the case's impact on foreign policy."²²

The Court required lower courts to exercise "great caution" and employ "restrained . . . discretion" in ATS cases, and to engage in "vigilant door-keeping," particularly in extraterritorial cases that could interfere with foreign policy.²³

2. How *Baker* and *Sosa* Work Together

For the past two centuries, the federal judiciary has held that certain questions are committed by the Constitution to the political branches of government and, therefore, are not justiciable. The Court in *Marbury v. Madison* said, "[q]uestions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this Court."²⁴ In a general context, the leading Supreme Court authority applying the political question doctrine is *Baker v. Carr*. In *Baker*, the Court identified six factors for determining whether a case presents a non-justiciable political question:

"Prominent on the surface of any case held to involve a political question is found: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or

[2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."²⁵

If any "one of these formulations is inextricable from the case," the case must be dismissed as nonjusticiable.²⁶

In *Sosa*, the Supreme Court imposed a stricter level of scrutiny in political question cases involving the ATS, as exemplified in *Joo v. Japan*, a decision by the D.C. Circuit.²⁷ The *Joo* panel outlined the analytical framework for the application of *Baker* and *Sosa* in ATS cases to avoid interference with the conduct of U.S. foreign policy.

The court in *Joo* began by confirming that, in ATS cases, *Baker* is the "starting point for analysis under the political question doctrine."²⁸ The panel instructs courts, in applying *Baker*, "to focus their analysis upon 'the particular question posed, in terms of the history of its management by the political branches.'"²⁹

The panel then goes on to conclude that, in ATS cases, *Sosa* requires a heightened level of scrutiny, asserting that "the Supreme Court has recently given further direction more closely related to the legal and factual circumstances of this case: A policy of case-specific deference to the political branches may be appropriate in cases brought under the ATS."³⁰ The panel heeds *Sosa's* admonition that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."³¹

The *Joo* panel makes clear that, in ATS cases, *Sosa* requires a more exacting level of scrutiny in applying the political question doctrine. Similarly, "[i]n assessing whether plaintiffs have stated a claim under the Alien Tort

²⁵ *Baker* at 217.

²⁶ *Id.*

²⁷ *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005). The three-judge panel consisted of Chief Judge Ginsburg, and Judges Sentelle and Tatel.

²⁸ *Id.* at 48 (referencing *Baker*).

²⁹ *Id.* at 49 (quoting *Baker* at 211).

³⁰ *Id.*

³¹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 727-28 (emphasis added).

²² *Id.* at 733 n.21 (emphasis added). A rule of decision "provides the basis for deciding or adjudicating a case." *Black's Law Dictionary* at 1359 (8th ed., 2004).

²³ *Id.* at 728, 725, and 729.

²⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

Statute," Judge Louis Oberdorfer of the U.S. District Court for the District of Columbia, in *Doe v. Exxon Mobil* states, "courts must conduct a more searching merits-based inquiry than is required in a less sensitive arena."³²

Even in non-ATS cases filed by U.S. citizens, courts have concluded that *Sosa* and *Altmann* require heightened deference to the executive branch in the conduct of foreign policy.³³

3. A Ninth Circuit Panel Ignores *Sosa*

In August 2006, a divided three-judge Ninth Circuit panel issued a decision in *Sarei v. Rio Tinto*,³⁴ a case involving claims by residents of Papua New Guinea ("PNG") against an international mining company alleging they were victims of violations of international law. In 2001, the United States State Department had filed a Statement of Interest ("SOI") in the federal district court. After noting that the district court had not asked the United States to comment on the act of state and political question doctrines, the State Department stated that, "[I]n our judgment, continued adjudication of the claims . . . would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of our foreign relations," and that PNG, "a friendly foreign state," had "perceive[d] the potential impact of this litigation on U.S.-PNG relations, and wider regional interests to be 'very grave.'"³⁵ In 2002, the district court dismissed the plaintiffs' ATS claims as presenting a nonjusticiable political question, and on other grounds.

The Ninth Circuit panel withheld ruling on the district court's dismissal of the claims, awaiting the Supreme Court's decision in *Sosa*. In the five years between the 2001 filing of the U.S. Government's SOI and the 2006 appellate decision, PNG's interests apparently had shifted with the installation of a new government, which purportedly advised the court that "the suit will *not* harm or affect the ongoing Bougainville peace process."³⁶ The court asked the State Department to update its original SOI. The Department declined to do so.

The Ninth Circuit panel, acting on its own motion, considered whether or not to uphold the original dismissal of the case in light of *Sosa*. In reaching its decision, the court had to take account of the State Department's original SOI (supported by "countries participating in the multilateral peace process"),³⁷ and of *Sosa's* instruction that "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."³⁸

Relying principally on the Second Circuit's pre-*Sosa* decision in *Kadic v. Karadzic*,³⁹ the panel improperly ruled that courts need only accord nominal deference to the executive branch in cases involving foreign relations:

"The fourth, fifth and sixth Baker factors are relevant in an [ATS] case 'if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.' *Kadic*, 70 F.3d at 249. To determine whether these factors are present, we must decide how much weight to give the State Department's [SOI], which provided the basis for the district court's determination that the fourth, fifth and sixth factors were present. . . . The Second Circuit has stated that 'an assertion of the political question doctrine by the Executive Branch, entitled to *respectful consideration*, would not necessarily preclude adjudication.' *Kadic*, 70 F.3d at 250."⁴⁰

The *Sarei* panel also quoted from *Ungaro-Benages v. Dresdner Bank AG*,⁴¹ a decision rendered by the Eleventh Circuit two months after the Supreme Court had handed down its *Sosa* and *Altmann* decisions:

"More recently, in [*Ungaro-Benages*], the Eleventh Circuit found an [ATS] suit justiciable despite an SOI from the government disapproving of the suit, and noted, "This statement of interest from the executive is entitled to deference. . . . A statement of nation[al] interest alone, however, does not take the present litigation outside the competence of the judiciary."⁴²

³² *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) [hereinafter *Exxon Mobil*].

³³ See *Whiteman v. Dorotheum GMBH & Co. KG*, 431 F.3d 57, 71 (2d Cir. 2005) [hereinafter *Whiteman*]. See also *Ungaro-Benages* and *In re Nazi Era Cases* discussed below.

³⁴ 456 F.3d 1069 (9th Cir. 2006) [hereinafter *Sarei*]. The panel split 2-to-1. The dissenting opinion called for the application of the "exhaustion" doctrine to the facts of the case and consistent with basic principles of international law. The dissent stated that "the dispute before us is a textbook case for exhaustion of local remedies." It cited *Sosa* for the proposition that the Supreme Court would "certainly consider" the exhaustion requirement in an appropriate case, emphasizing that "this [*Sarei*] is such a case." *Id.* at 1100.

³⁵ *Id.* at 1075 (citing Statement of Interest of the United States).

³⁶ *Id.* at 1082.

³⁷ *Id.* at 1082 n.10.

³⁸ *Sosa* at 733 n.21.

³⁹ 70 F.3d 232 (2d Cir. 1995) [hereinafter *Kadic*].

⁴⁰ *Sarei* at 1080 (emphasis added).

⁴¹ 379 F.3d 1227 (11th Cir. 2004) [hereinafter *Ungaro-Benages*].

⁴² *Sarei* at 1081 (quoting *Ungaro-Benages* at 1236).

The *Sarei* court noted that the Eleventh Circuit in *Ungaro-Benages* "ultimately dismissed the claims on comity grounds,"⁴³ but the *Sarei* court stopped short of noting that the panel in *Ungaro-Benages* explicitly relied upon *Altmann* as the underpinning for its decision to dismiss on the basis of comity. The Eleventh Circuit stated: "This statement of interest from the executive is entitled to deference and we give the executive's statement such deference in our comity analysis. See *Republic of Austria v. Altmann*."⁴⁴

While the *Sarei* court relied upon the Second Circuit's decision in *Kadic*, rendered nine years before the Supreme Court's decision in *Sosa* and *Altmann*, the *Sarei* panel chose not to examine the Second Circuit's post-*Sosa* decision in *Whiteman*, which directly rejects the dictum announced in *Ungaro-Benages* refusing to dismiss on political question grounds:

"We note that, in *Ungaro-Benages* . . . the Eleventh Circuit recently declined to dismiss a Holocaust-related claim against German banks on the basis of the 'political question' doctrine, instead dismissing the claim on the ground of international comity. . . . [W]e respectfully disagree with the Eleventh Circuit's view that such a provision renders the 'political question' doctrine inapplicable."⁴⁵

Consistent with this view, the Second Circuit held in *Whiteman* that *Altmann* and *Sosa* compelled dismissal of the complaint under the political question doctrine:

"Our resolution of this case under the political question doctrine is greatly reinforced by the historic deference due to the Executive in the conduct of the foreign relations of the United States, as highlighted by the Supreme Court's recent guidance in *Altmann* and *Sosa*."⁴⁶

In the teeth of the Second Circuit's decision in *Whiteman*, and relying principally on judicially outmoded legal doctrine, the *Sarei* panel concluded:

"Guided by separation of powers principles, as well as the cases discussed above, we conclude that although we will give the view in the SOI 'serious weight,' it is not controlling on our determination of whether the fourth through sixth *Baker* factors are

present. Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding."⁴⁷

In coming to this conclusion, the *Sarei* court fundamentally misappreciated the duties that the Supreme Court had imposed in *Sosa* and *Altmann*. Under basic principles of Article III jurisprudence, there is no dispute that federal courts have the responsibility to determine whether the political question doctrine compels dismissal. The rule of decision that federal courts must apply in deciding whether to dismiss is established by the Supreme Court in *Sosa* and *Altmann*. Courts must accord the executive great deference.⁴⁸ The jurisprudential principles upon which *Sosa* and *Altmann* are built have been embedded in constitutional law for well over 50 years:

"[Issues] vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of Government as to be largely immune from judicial inquiry or interference."⁴⁹

As the *Sosa* Court emphasized, this is particularly true in extraterritorial ATS cases.

The court in *Sarei* appears to have accorded undue weight to the Supreme Court's admonition in *Baker* that "not every case that touches foreign relations is outside of judicial cognizance."⁵⁰ What the *Sarei* court failed to weigh properly was the Supreme Court's later mandates in *Sosa* and *Altmann* that courts should accord deference to the executive branch in cases where foreign policy concerns are present. The *Altmann* Court defined the rule of decision respecting deference to the executive as follows:

"[S]hould the State Department choose to express its interest on the implications of exercising jurisdiction over *particular* [foreign states] in connection with their alleged conduct, that opinion

⁴⁷ *Sarei* at 1081 (emphasis added).

⁴⁸ By conflating jurisprudence with rule of decision, the Ninth Circuit set up a "straw man," and in demolishing it acted contrary to what is now settled law.

⁴⁹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (citing *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); U.S. Const. art. IV, § 4; and other sources).

⁵⁰ *Sarei* at 1082 (quoting *Baker* at 217).

⁴³ *Sarei* at 1081 n.9.

⁴⁴ *Ungaro-Benages* at 1236.

⁴⁵ *Whiteman* at 72, n.16.

⁴⁶ *Id.* at 71.

might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."⁵¹

In *Sosa*, decided a few weeks after *Altmann*, the Court again urged case-specific deference to the political branches. Relying on *Altmann*, the Court stated that when the U.S. Government submits statements of interest to federal courts, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."⁵²

The fact that the Ninth Circuit panel felt that it had sufficient latitude to marginalize *Sosa's* restrictions may be explainable in part by the case-specific circumstances confronting the court in *Sarei*. The newly installed PNG government had apparently reversed its position that adjudication of the case would interfere with foreign relations. The court also pointed out that "this case presents claims that relate to a foreign conflict in which the United States had little involvement (so far as the record demonstrates), and therefore that 'merely touch foreign relations.'"⁵³ The court noted the "State Department explicitly did not request that we dismiss this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the Executive, even if it would prefer that the suit disappear."⁵⁴ Finally, when the court had asked the State Department to update its SOI, the Department had declined to do so.

The problem with the *Sarei* opinion is not necessarily the court's failure to dismiss the case based upon a compromised set of facts. It is that the court took advantage of a convenient fact pattern to issue a broad ruling, inconsistent with *Sosa* and *Altmann*, that courts need accord only "respectful consideration" to the "considered judgment" of the executive branch in cases where foreign policy considerations are present, rather than the genuinely "serious weight" prescribed by the Court in *Sosa*.

4. The Executive Branch Confronts the *Sarei* Decision

Within weeks after the Ninth Circuit panel issued the *Sarei* decision, the Departments of State and Justice (the "Government") filed an *amicus* brief requesting a panel rehearing or a rehearing *en banc*. The Government stated that *Sarei* is:

"[T]he first case since *Sosa* in which this court has considered the types of claims that may be asserted as a matter of federal common law under the ATS. The panel majority considered that issue, however, even though no party had raised it and without any briefing by the parties regarding the proper application of *Sosa*. In this context, the panel simply held that *Sosa* changed nothing and that all of plaintiffs' international law claims upheld by the district court were cognizable as a matter of federal common law. The panel went further and opined on the availability of vicarious liability for these claims. Again, the panel reached its conclusion although the issue was not raised or briefed by the parties."⁵⁵

In its *amicus* brief, the Government argued that the panel should not have "reached out to decide the validity of plaintiffs' claims. We further demonstrate that the majority's evaluation of the claims does not comport with the requirements of *Sosa*."⁵⁶

The Department of Justice also felt compelled to file *amicus* briefs and SOI's in other pending Ninth Circuit cases, including *Mujica v. Occidental Petroleum Corp.*⁵⁷ and *Corrie v. Caterpillar, Inc.*⁵⁸ This series of briefs illustrates the Government's concern that other courts in the Ninth Circuit, and elsewhere, might follow the *Sarei* court's lead toward a pre-*Sosa* expansionist application of the ATS. The Government has reiterated the *Sosa* Court's admonition that lower courts must engage in "vigilant doorkeeping," lest the ATS interfere with the conduct of U.S. foreign policy and trench on constitutional separation of powers.

In its brief calling for an *en banc* rehearing, the Government demonstrated that *Sarei* "does not comport with the requirements of *Sosa*."⁵⁹ The Government noted that "the Supreme Court repeatedly admonished the

⁵⁵ Brief of the U.S. as *Amicus Curiae*, *Sarei* at 2 [hereinafter *Sarei Amicus*].

⁵⁶ *Id.* at 3.

⁵⁷ 381 F. Supp. 2d 1164 (C.D. Cal. 2005) [hereinafter *Mujica*].

⁵⁸ 403 F. Supp. 2d 1019 (W.D. Wash. 2005) [hereinafter *Corrie*].

⁵⁹ *Sarei Amicus* at 3 (See also section I.B., with the heading: "The Majority Fundamentally Misconstrued *Sosa* as Affirming This Court's Prior Standard for Recognizing Claims Under the ATS." *Id.* at 5.).

⁵¹ *Altmann* at 702 (emphasis in original).

⁵² *Sosa* at 733 n.21.

⁵³ *Sarei* at 1082.

⁵⁴ *Id.* at 82.

lower courts to exercise ‘great caution in adapting the law of nations to private rights; enumerating a series of reasons’ why courts must engage in ‘vigilant doorkeeping.’⁶⁰

The Government reiterated most of *Sosa*’s restrictions, described above, on the ability of courts to entertain ATS lawsuits that interfere with foreign policy, particularly extraterritorial ATS lawsuits. The brief noted that a “court in the United States is not well-positioned to evaluate what effect adjudication of claims . . . may have on a foreign sovereign’s efforts to resolve conflicts.”⁶¹

The Government’s brief also introduced legislative history to demonstrate that the “ATS does not ‘clearly express’ Congress’ intent to authorize the courts to project common law claims to conduct occurring entirely outside the jurisdiction of the United States.” The evidence, according to the brief, “is to the contrary”:

“Since the early years of the Republic, there has been a strong presumption that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . . The Supreme Court assumes that Congress legislates against a backdrop of the presumption against extraterritoriality. Thus, unless there is the affirmative intention of the Congress clearly expressed, in the language of the relevant Act, the Court will presume that a statute does not apply to actions arising abroad.”⁶²

Addressing the importance of these principles to the conduct of foreign relations, the Government concluded that the “presumption against extraterritoriality ‘serves to protect against unintended clashes between our laws and those of other nations which could result in internal discord.’”⁶³

The two other *amicus* briefs the Government recently filed in Ninth Circuit cases—*Mujica* and *Corrie*—underscore its concerns about the potential damage that would arise from an expansionist interpretation of the ATS. The federal district courts had dismissed both ATS cases, but the Government filed an *amicus* brief on appeal, nonetheless, to ensure that the Ninth Circuit understood the consequences involved in these cases. The U.S. Government brief in *Corrie* argued that the lower court “correctly observed” that if adjudication of a case would “impinge directly upon the

prerogatives of the Executive Branch,” such cases are appropriate for *Sosa*’s “case-specific deference to the political branches.”⁶⁴ The U.S. Government brief in *Mujica* agreed with the lower court’s dismissal of the case as non-justiciable, but added that it should have been dismissed as a matter of international comity due to litigation on the same matter in Colombia.⁶⁵

The Government’s prompt action in *Sarei*, *Mujica*, and *Corrie* demonstrates the commitment by the Departments of State and Justice to ensuring that lower courts apply *Sosa* with the “vigilance” the Supreme Court has directed. As the Government’s brief in *Sarei* warns:

“The cautions iterated by the Supreme Court were to ensure that, when exercising this common law authority, courts do so in a restrained and modest fashion. The Supreme Court went out of its way to chronicle reasons why a court must act cautiously and with ‘a restrained conception of . . . discretion’ in both recognizing ATS claims and in extending liability.”⁶⁶

⁶⁰ *Id.* at 6 (quoting *Sosa* at 725, 729).

⁶¹ *Id.* at 14.

⁶² *Id.* at 12 (internal quotations omitted).

⁶³ *Id.* at 13 (quoting *Arabian Am. Oil* at 248, *supra*).

⁶⁴ Brief of the U.S. as *Amicus Curiae*, *Corrie* at 2.

⁶⁵ Brief of the U.S. as *Amicus Curiae*, *Mujica* at 8.

⁶⁶ *Sarei Amicus* at 27 (quoting *Sosa* at 744).

C. The Emerging Effort by Contingency Fee Lawyers to Test the Outer Limits of Post-*Sosa* ATS Liability:

The Move to Introduce Global Plaintiff and Defendant Classes in Unprecedented ATS Mass Tort Lawsuits

In the limited number of ATS cases decided since *Sosa*, the clear trend is toward faithful execution of the rigorous restrictions prescribed by the Supreme Court. The divided panel in *Sarei* chose to swim against that tide. Meanwhile, a number of district court cases are slated for appellate review and some circuits have yet to weigh in on justiciability in post-*Sosa* ATS cases.

The lack of closure illustrated in *Sarei* has inspired contingency fee law firms to file opportunistic "stalking horse" ATS lawsuits with an alarmingly ambitious objective: to convince U.S. courts to adjudicate wholly extraterritorial ATS claims on behalf of enormous, vaguely defined classes composed entirely of foreign plaintiffs. A recent filing illustrates the contingency fee lawyers' emerging strategy. In September 2006, an ATS class action lawsuit was filed in the Southern District of Florida: *Mother Doe I, et al. v. Sheikh Mohammed Bin Rashid Al Maktoum, Sheikh Hamdan Bin Rashid Al Maktoum, et al.*⁶⁷ A motion to dismiss is now pending.

The complaint identifies a class of up to 30,000 unnamed plaintiffs who "reside, or have resided, in Pakistan, Bangladesh, Sudan, Mauritania, or other South Asian or African countries." Additionally, the complaint names two "representative defendants": the Prime Minister and the Finance Minister of the United Arab Emirates ("U.A.E."). The complaint contends that these defendants represent up to 500 other unnamed defendants who are "as of yet unknown" and hail from "Persian Gulf and Arabian Peninsula states such as the U.A.E., Saudi Arabia, Qatar and others."

The class in *Mother Doe* is so large—over 30,000 unnamed plaintiffs—that it rivals in size the classes in abusive asbestos lawsuits that currently plague U.S. courts. In the emerging ATS suits, trial lawyers seek judicial recogni-

tion of "global class actions," which, if certified by courts, will convert the ATS, a one-sentence 200-year-old jurisdictional provision, into a source of modern-day global mass tort liability. Potential ATS defendants, including corporations, foreign government leaders, and, in perhaps the next wave, U.S. Government leaders and law enforcement officials, would become vulnerable to hundreds of billions of dollars in newly invented ATS class action liability.⁶⁸ It would be impossible for U.S. courts adequately to police the recruitment of plaintiffs who reside in locations as remote as "South Asian or African countries" into these gigantic extraterritorial classes, thus opening the way for new broad-scale abuse in the U.S. litigation system.

In *Mother Doe* and *Burnett*, trial lawyers have targeted massive class actions at vital U.S. allies in the global war on terror. The U.A.E. and Saudi Arabia are influential moderate governments in the volatile Middle East, where sensitive diplomacy is required to protect the United States' national security interests. If the political question doctrine has application in any area of U.S. diplomacy, it must apply to extraterritorial class action lawsuits against important U.S. allies in areas where U.S. national security is a paramount concern.

⁶⁷ Civil Action No. 06-2253 (S.D. Fla. 2006) was filed by Motley Rice. *Mother Doe* is not Motley Rice's first foray into class action suits targeting classes of wealthy Middle East defendants. In *Burnett*, Motley Rice launched a sweeping case aimed at over 200 defendants, including prominent citizens, banks, and leaders of the Saudi Kingdom.

⁶⁸ See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 7 (Institute for International Economics (2003)) (estimating potential ATS liability at \$200 billion). Note, however, in a single case, *Apartheid Litig.*, now pending on appeal in the Second Circuit, plaintiffs seek \$400 billion in compensatory and punitive damages. *Apartheid Litig.* at 546.

D. Observations and Recommendations in the Face of Emerging Contingency Fee Global ATS Class Actions

1. Congressional Direction Unlikely

The Court in *Sosa* invited Congress to clarify its intent regarding the scope of the ATS. In *Exxon Mobil*, Judge Oberdorfer cited the need for courts to be “heedful of the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations of the Alien Tort Statute.”⁶⁹

In response to *Sosa*, Senator Dianne Feinstein (D-Cal.) introduced a bill (S. 1874) in the 109th Congress to limit substantially the scope of ATS lawsuits. But recent experience with asbestos and other mass torts demonstrates that Congress today—with close margins of partisan control and strong trial bar influence—is unlikely to enact clarifying legislation. This leaves vigilant participation by the U.S. Government and faithful application of *Sosa* by lower courts as the only realistic near-term line of defense against abuse of the ATS by the U.S. trial bar. Experience in class actions involving asbestos, silicosis, and other mass torts indicates that some courts, unless guided by the U.S. Government, may fail to exercise the “vigilant doorkeeping” against abuse in ATS cases commanded by *Sosa*.

2. Effective U.S. Government Participation Can Provide Important Guidance to Courts

The responsibility of a federal court is to decide cases before it on the basis of the facts and law. In *Sosa*, the Supreme Court constrained lower federal courts to approach every ATS case with a high degree of skepticism. The “high bar” set in *Sosa* will rarely be cleared, and the lower courts will apply the mandated *Sosa* admonitions regardless of any expression of views by the executive branch through either an amicus brief or an SOI. This was precisely the situation in *Corrie*, where the court reached its conclusion to dismiss the case on political question grounds based on its own analysis of the specific foreign policy factors involved. In view of its granting of the motion to dismiss, the court denied defendant’s motion to solicit the view of the executive branch.⁷⁰

There may be occasions where the courts will seek advice on difficult issues by appealing to the executive branch for an expression of views, just as a federal court may certify questions of state law to the appropriate state court. Concomitantly, Congress vested the executive branch with the power to register its views in U.S. courts *sua sponte*.⁷¹

As occurred in *Corrie*, faced with cases that clearly implicate foreign relations, federal courts may proceed to enforce the *Sosa* guidelines with or without an SOI by the executive branch. Increasingly, though, post-*Sosa*, courts have elicited the views of the executive branch to inform the courts’ judgment about the executive’s position on foreign policy implications in particular cases. As *Sosa* and *Altmann* make clear, proper deference by federal courts to the executive branch is expected.

For the executive branch, the ability to express its views regarding the impact of a case on foreign relations can itself be an instrument of foreign policy. It enables the executive to protect its prerogatives against lawsuits that threaten to interfere with ongoing foreign policy. Sometimes, the fact that the executive has submitted its views in an intrusive lawsuit can help the executive to promote its foreign policy objectives.

While lower federal courts generally will be capable of applying the *Sosa* standards, with or without an expression of views by the federal government, a submission by the Government of its “considered judgment” can provide important guidance to courts.⁷²

The prompt filing of amicus briefs by the Departments of State and Justice after the *Sarei* decision sends a promising signal that the Government intends to participate assertively to prevent lower courts from disregarding *Sosa*’s restrictions on the scope of ATS cases. In *Sarei*, the Government was concerned that a Ninth Circuit panel might bind other courts in that circuit to principles inconsistent with *Sosa*. Absent persistent, timely Government participation, the possibility also exists that courts in other circuits could be tempted to follow the lead of courts, like the *Sarei* panel, which misapply *Sosa*.

The *Sarei* experience also teaches another lesson. Where the U.S. Government files an SOI but fails to provide a comprehensive, unambiguous description of the adverse consequences that a case poses for the

⁷¹ 28 U.S.C. § 517 (“The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”).

⁷² *Altmann* at 702.

⁶⁹ *Exxon Mobil* at 24.

⁷⁰ *Corrie* at 1033.

conduct of foreign policy, or stops short of calling conclusively for dismissal on the basis of the political question doctrine, international comity, exhaustion of foreign remedies, or other applicable grounds, courts inclined to sidestep *Sosa* may engage in the type of "innovative interpretation" that Judge Oberdorfer warned against.

In *Joo*, the strength of the Government's SOI was a material factor in causing dismissal under the political question doctrine. As the *Joo* court noted, "we defer to the judgment of the Executive Branch of the U.S. Government, which represents, in a thorough and persuasive statement of interest that judicial intrusion . . . would impinge on the ability of the President to conduct the foreign relations of the United States."⁷³

By contrast, the court in *Sarei* noted that the Government's SOI had failed to specifically request dismissal. As a result, the court concluded that dismissal was not required, notwithstanding *Sosa's* far-reaching restrictions, "simply because the Executive Branch expresses some hesitancy about a case proceeding."⁷⁴

Similarly, in *Doe v. Qi*,⁷⁵ the State Department submitted a comparatively weak and ambiguous SOI to the court:

"If the court finds that the [Foreign Sovereign Immunities Act] is not itself a bar to these suits, such practical considerations, when coupled with the potentially serious adverse foreign policy consequences that such litigation can generate, would in our view argue in favor of finding the suits non-justiciable. However, if the court were to determine that dismissal is not appropriate, we would respectfully urge the court to fashion its final orders in a manner that would minimize the potential injury to the foreign relations of the United States."⁷⁶

The district court assigned consideration of the Government's SOI to a magistrate judge who proceeded to engage in "innovative interpretation" designed to sidestep *Sosa* while nominally accommodating the Government's suggestion that the case be conducted in a way that would "minimize the potential injury to the foreign relations of the United States." The magistrate found:

"[B]ecause . . . the risk of interfering with the Executive Branch is minimal were this Court to enter declaratory judgment, particular[ly] if, as discussed below, that judgment is limited to the individual claims brought by the plaintiffs, the Court concludes that the act of state doctrine bars plaintiffs' claim for damages and injunctive relief but not their claim for declaratory relief."⁷⁷

This imaginative approach by the magistrate judge prompted the State Department to file a second SOI, which concluded as follows: "[W]e disagree with the view that declaratory relief of the nature sought would neutralize any foreign policy concerns about adjudication of these cases. Indeed, the act of state doctrine counsels against the courts making such an assessment in the face of Executive Branch assessments to the contrary."⁷⁸ Notwithstanding the State Department's second SOI urging dismissal, the district court in the Northern District of California adopted the magistrate judge's report and granted declaratory relief, concluding, "the [magistrate judge's] Report properly addresses the concerns expressed by the United States."⁷⁹

To prevent courts from usurping the executive branch's power to conduct foreign relations, the Government should ensure not only that it participates in a timely way (as it has in *Sarei*, *Mujica*, and *Corrie*) but also that its briefs and SOI's clearly describe the full extent of the Government's interest in the case and conclusively advocate the outcome the Government expects to achieve. Any ambiguity in a Government-issued SOI can and will be read by some courts as an invitation to engage in "innovative interpretation" inconsistent with *Sosa*.

In evaluating the strength of an SOI filed by the executive branch, courts sometimes have been persuaded by the existence of diplomatic notes and other formal communications by foreign governments engaged in diplomacy with the United States.⁸⁰ When a foreign government files a diplomatic note that is subsequently conveyed to the court by the U.S. Government, that sovereign's representation can be a telling indicator that allowing a case to proceed will interfere in ongoing diplomatic activities. In contrast, when the newly installed PNG government apparently informed the court in *Sarei* that diplomatic relations would not be impaired if the

⁷³ *Joo* at 48. In *Doe v. Exxon Mobil Corp.*, 2007 WL 79007, at *22 (D.C. Cir.), the D.C. Circuit, referencing ambiguity in an SOI, invited the Government to file "further letters or briefs with the district court" expressly addressing the state law claims involved.

⁷⁴ *Sarei* at 1081.

⁷⁵ 349 F. Supp. 2d 1258 (N.D. Cal. 2004) [hereinafter *Qi*].

⁷⁶ Statement of Interest of the United States, *Qi*, Sept. 26, 2002 (emphasis added).

⁷⁷ *Qi* at 1306.

⁷⁸ Statement of Interest of the United States, *Qi*, Aug. 4, 2004, Exhibit A: Letter from State Department Legal Advisor William H. Taft IV to Department of Justice Acting Assistant Attorney General Daniel Meron, dated Aug. 3, 2004.

⁷⁹ *Qi* at 1264.

⁸⁰ See, e.g., *Exxon Mobil and Mujica*.

case proceeded, the court seized upon that foreign government's communication as a reason for allowing the case to go forward.

The Government's interest in limiting courts' expansion of the ATS is not a partisan matter. The Departments of Justice, State, Defense, Homeland Security, Treasury, and other agencies vested with diplomatic and national security responsibilities share a commitment to urging courts not to reach beyond the types of restrictions imposed by *Sosa*. This was true in the Clinton administration, and it is true in the current Bush administration. The Bush administration has effectuated a valuable procedural reform. Rather than allowing individual departments to decide when and on what basis the Government should submit SOI's in individual cases, the Solicitor General has institutionalized a process for coordinating interagency views. Properly administered, this interagency process should help to prevent the type of equivocation in SOI's that created an opening for the court in *Qi*, for example, to circumvent the *Sosa* restrictions. Moreover, a unified interagency position on behalf of the United States is entitled to enhanced deference under *Sosa*, as the Second Circuit noted in *Whiteman*.⁸¹

The Court in *Sosa* directed lower courts to accord "serious weight" to the views of the Government in ATS cases. The Court's direction provides the Government with an opportunity to prevent erosion of *Sosa*'s restrictions, and with the responsibility to do so as effectively as possible.

3. Disregard for the *Sosa* Requirements Can Seriously Imperil Vital U.S. Interests

Whereas the court in *Sarei* felt unconstrained by *Sosa*, where the court deemed the impact on foreign relations to be incidental, other courts have applied *Sosa* with diligence when the courts concluded that adjudication might adversely impact an important U.S. strategic relationship in a vital region.

Twenty-first century U.S. foreign policy has entered a volatile and transformational period. The United States' national security interests are at risk in various parts of the world, but particularly in certain critical regions. As the U.S. conducts the global war on terror, a number of nations have become indispensable strategic allies. The need for careful diplomacy now is vitally important.

Courts are aware of these realities. In ATS cases following *Sosa*, courts generally have deferred to the political branches in conduct of foreign pol-

icy, notably in cases where national security issues are most paramount. For example, in *Corrie*, after heavy equipment had been used to destroy buildings in Palestinian territory, plaintiffs sued Caterpillar for damages and sought a court order restricting Caterpillar from supplying products to Israel. A federal court in the Western District of Washington determined that "to order Caterpillar to cease supplying products to Israel would certainly invade the foreign policy prerogatives of the political branches of government."⁸² The court exercised "great caution" based on the sensitivity of U.S. foreign policy in the region. The court concluded, "[t]his lawsuit challenges the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great. This cause of action must be dismissed."⁸³

Additionally, the D.C. Circuit Court in *Joo* weighed concerns of regional stability and the delicacy of foreign relations (in this context, among Japan, China, and Korea). The court was persuaded that "adjudication by a domestic court not only would undo a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's delicate relations with China and Korea, thereby creating serious implications for stability in the region."⁸⁴ Similarly, when dismissing plaintiffs' claims in *Mujica*, on political question grounds a federal court in the Central District of California aptly considered the potential negative impact on vital U.S. foreign policy. The court noted the concerns raised by the U.S. State Department that:

"Colombia is one of the United States' closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking . . . Colombia's role in helping to maintain Andean regional security, our trade relationship, and our national interests in the security of U.S. persons and U.S. investments in Colombia, rank high on our foreign policy agenda."⁸⁵

There have been recent instances where courts have concluded, based on case-specific factual analyses, that failure to dismiss a case under the political question doctrine will not materially affect the conduct of U.S. foreign relations. In contrast to *Sarei*, even in those cases, courts have recognized that *Altmann* and *Sosa* require heightened deference to the executive branch if foreign affairs implications are present.

⁸² *Corrie* at 1032.

⁸³ *Id.* at 1032-33 (internal citation omitted).

⁸⁴ *Joo* at 52.

⁸⁵ *Mujica* at 1188.

As an illustration, consider three cases involving reparation claims filed in U.S. courts involving World War II and Nazi-era abuses. In all three cases, the Government filed SOI's urging dismissal "on any available legal ground." The United States was required to file those SOI's under the terms of international agreements establishing claims facilities designed to serve as the exclusive remedy and forum for satisfaction of claims.

The Eleventh Circuit decided the first of the three cases, *Ungaro-Benages*, in August 2004, just two months after the Supreme Court had handed down its *Altmann* and *Sosa* decisions urging heightened deference to the executive branch where foreign policy issues are involved. In *Ungaro-Benages*, the district court had dismissed based on political question, international comity, and other grounds. The appellate court declined to dismiss based on political question grounds. As the court interpreted the international agreement establishing the claims facility, it concluded that the agreement itself by its own terms had contemplated continued litigation in U.S. courts:

"Here none of the factors that advise against judicial resolution are present. Adjudication of the present claim would not interfere with the executive's handling of foreign relations or show a lack of respect to the executive's power in foreign affairs. Indeed, the plain text of the Foundation Agreement anticipates that federal courts will consider claims against German corporations. The entirety of Annex B of the agreement is dedicated to explaining what the United States will include in its Statement of Interest to American courts hearing these cases. Furthermore, the agreement itself provides that it does not provide an independent legal basis for dismissal. . . . Thus, the executive opted not to settle these claims, or to transfer the claims to the Foundation, although it had the power to do so."⁸⁶

The court went on to conclude that:

"Although the executive's statement of interest is entitled to deference, it does not make the litigation non-justiciable. Moreover, the judiciary is not interfering with foreign relations or showing a lack of respect to the executive when it interprets an international agreement according to its terms."⁸⁷

The decision not to dismiss under the political question doctrine was the result of a case-specific factual analysis that led the court to conclude that "[t]he President has purposefully chosen not to settle these claims directly and, instead, has instructed the federal courts to use existing legal grounds."⁸⁸

But in contrast to the *Sarei* decision, the Eleventh Circuit panel went on to address the requirement of *Altmann* that courts accord deference to the Executive Branch in cases involving the conduct of foreign relations. The court concluded that, under *Altmann*, "[t]his statement of interest from the executive is entitled to deference and we give the executive's statement such deference in our international comity analysis."⁸⁹

The court then decided, notwithstanding its holding that the political question doctrine did not require dismissal, "to abstain based on the strength of our government's interests in using the Foundation, the strength of the German government's interests, and the adequacy of the Foundation as an alternative forum."⁹⁰ The court reiterated that, under *Altmann*, "[e]ven if the governments had not engaged in negotiations on this issue, the executive's statements of national interest in issues affecting our foreign relations are entitled to deference."⁹¹

Even though the court's analysis in *Ungaro-Benages* led to the conclusion that the facts would not warrant a political question dismissal, the court nonetheless dismissed the case under the international comity doctrine, deferring to the executive's interest in issues affecting U.S. foreign relations.

Within a year after the *Ungaro-Benages* decision, two other circuit courts reviewed motions to dismiss similar claims. In November 2005, the Second Circuit decided *Whiteman*. In August 2006, the Third Circuit decided *In re Nazi Era Cases Against German Defendants Litig.*⁹²

In both cases, the courts reached the same result as the Eleventh Circuit had in *Ungaro-Benages*—dismissal based on deference to the executive. But in both, the courts disagreed with the Eleventh Circuit's fact-specific conclusions and dismissed under the political question doctrine.

⁸⁸ *Id.* at 1237.

⁸⁹ *Id.* at 1236.

⁹⁰ *Id.* at 1239.

⁹¹ *Id.* at 1239 n.14.

⁹² 2006 U.S. App. LEXIS 19477 (3d Cir. 2006).

⁸⁶ *Ungaro-Benages* at 1235.

⁸⁷ *Id.* at 1236 n.12.

The Second Circuit panel in *Whiteman* reached its conclusion based on the strength of the United States' SOI, which the court noted represented the combined views of the State and Justice Departments, and thus comprised the "considered views" of the "Executive Branch of the Government."⁹³ The court took note of the Government's views that adjudication would affect U.S. relations with Austria and with Israel, would delay payments to elderly claimants, and would be inconsistent with a years-long diplomatic effort to resolve long-standing claims through diplomacy. The court added a case-specific factual analysis of its own, finding that, by its terms, the Foundation Agreement provided that no claims could be paid to anyone until all U.S. lawsuits had been dismissed—the instant suit being the last obstacle to the start of payments to claimants.

Based upon that analysis, the court concluded that adjudication would interfere with the objective of the Agreement—payments to worthy claimants—and thus would interfere with the United States' foreign policy objectives.

The court relied on *Altmann* and *Sosa* for its case-specific deference to the executive branch in an area where there was a clear history of its management of the issues.⁹⁴ Indeed, the court noted that the United States itself had become more assertive in the wake of *Altmann*:

"When the Government first submitted its statement of interest to the District Court, it did not urge that the Court rest on the foreign policy interests of the United States as an independent legal basis for dismissal. . . . [I]n the wake of *Altmann*, however, the United States no longer offers this qualification and instead asserts that deference to 'the views of the Executive on this nation's foreign policy interests in determining whether to exercise jurisdiction in a particular case' supports dismissal of plaintiffs' claims."⁹⁵

The court based its decision to dismiss the case as nonjusticiable on an analysis of the history of management by the political branches under *Baker*, informed by *Sosa* and *Altmann*:

"Our inquiry into the proper deference to be accorded to the United States Statement of Interest is guided by our application of the political question doctrine because this doctrine reflect[s] the judiciary's concerns regarding separation of powers'. . . . Our

resolution of this case under the political question doctrine is greatly reinforced by the historic deference due to the Executive in the conduct of foreign relations of the United States, as highlighted by the Supreme Court's recent guidance in *Altmann and Sosa*."⁹⁶

The court found that "a court's undertaking independent resolution of this claim" is "impossible 'without expressing lack of the respect due' the Executive Branch."⁹⁷

Since the Supreme Court decided *Altmann* and *Sosa* in 2004, most courts have dismissed cases routinely—usually under the political question doctrine, but occasionally based on international comity or other grounds—where adjudication would interfere with foreign relations.⁹⁸

In cases involving national security with strategic allies in volatile regions, where sensitive diplomacy is required, the consequence of courts circumventing *Altmann* and *Sosa* would be especially egregious if strategic U.S. foreign relations were disrupted or impaired.

It is noteworthy that the international agreements that were the subject of *Ungaro-Benages*, *Whiteman*, and *In re Nazi Era Cases* were prompted by the United States' and the signatory foreign countries' concerns about a surge in opportunistic class actions filed by trial lawyers in U.S. courts in the 1990s.⁹⁹ Indeed, the agreements themselves reference as one of their principal objectives the creation of an "all embracing and enduring legal peace to advance their foreign policy interests."¹⁰⁰

Like the 1990's class actions, the *Mother Doe* ATS class action and others like it interfere with vital strategic diplomacy without due regard for the national interest.

⁹⁶ *Id.* at 71.

⁹⁷ *Id.* at 72 (internal citation omitted).

⁹⁸ See, e.g., *Joo, Mujica, and Corrie*.

⁹⁹ *Ungaro-Benages* at 1231. In *Am. Ins. Ass'n v. Garamendi*, the Supreme Court described the surge of class actions and their impact on foreign relations as follows: "[C]lass-action lawsuits for restitution poured into United States Courts against companies doing business in Germany during the Nazi era. . . . These suits generated much protest by the defendant companies and their governments, to the point that the Government of the United States took action to try to resolve 'the last great compensation related negotiation arising out of World War II'. . . . From the beginning, the Government's position . . . stressed mediated settlement 'as an alternative to endless litigation'. . . . The willingness of the Germans to create a voluntary compensation fund was conditioned upon some expectation of security from lawsuits in United States courts. . . ." 539 U.S. 396, 405 (2003) [hereinafter *Garamendi*].

¹⁰⁰ *In re Nazi Era Cases* at *4.

⁹³ *Whiteman* at 62, n.7.

⁹⁴ *Id.* at 68-69.

⁹⁵ *Id.* at 69.

4. Allowing Global Class Actions Would Open the U.S. Judicial System to Broad New Abuse

The U.S. judicial system has been subjected to serious abuse in the formation of domestic class actions in various areas, including tobacco, asbestos, silicosis, fen-phen, mold, lead paint, and securities litigation.¹⁰¹ The result of the widespread asbestos fraud alone has taken years to unravel, with criminal proceedings still pending and a trail of over 70 bankrupted U.S. companies littered in its wake. The fraud perpetrated on the courts by many of these asbestos cases has demonstrated conclusively that when class sizes number in the tens of thousands, they can become unmanageable for courts, even when plaintiffs, defendants, and the alleged conduct are all wholly centered in the United States.

The emerging effort by contingency fee lawyers to construct global ATS class actions with no nexus to the United States, where tens of thousands of plaintiffs and defendants reside in remote foreign locations, poses insuperable burdens on the administration of the U.S. judicial system. These actions were never contemplated by Congress, and courts should apply a strong presumption against recognition of extraterritorial ATS classes.

5. Trial Lawyers' Reliance on U.S. Government Diplomatic Reports Should Be Recognized as Self-Defeating

The *Mother Doe* complaint references human rights reports issued by the Department of State to bolster its claims. Clearly, the trial lawyers hope to establish that Human Rights Reports, issued annually by the State Department, are susceptible to use in the formation of ATS class action claims. However, these annual reports, mandated by an act of Congress in 1961, identify human rights practices subject to U.S. diplomacy in every country that receives U.S. foreign assistance or that is a member of the United Nations. These reports are employed by the U.S. Government as a diplomatic instrument to resolve human rights abuses. According to Barry F. Lowenkron, the Assistant Secretary of State for Democracy, Human

¹⁰¹ *False Witness*, WALL ST. J., Dec. 2, 2006, at A9. See also *Trial Bar Clean Up*, WALL ST. J., Feb. 11, 2006, at A8; *Screening for Corruption*, WALL ST. J., Dec. 2, 2005, at A10; *Unbundling Asbestos*, WALL ST. J., Aug. 21, 2006; *Silicosis Scandal*, WALL ST. J., Aug. 12, 2005, at A8; *The Silicosis Sheriff*, WALL ST. J., July 14, 2005, at A10; *Asbestos Truth Telling*, WALL ST. J., Apr. 5, 2005, at A18; *Asbestos Fairness*, WALL ST. J., Dec. 9, 2004, at A16; *An Asbestos Exit*, WALL ST. J., Nov. 17, 2004, at A16; *Case of the Vanishing X-rays*, WALL ST. J., Aug. 31, 2005, at A8; *Paint by Lawyer*, WALL ST. J., Nov. 7, 2005, at A20; *Motley Legal Crew*, WALL ST. J., Feb. 27, 2006, at A14; *Milberg, Weiss & Bush*, WALL ST. J., Oct. 26, 2006, at A18; *What's the Judge Smoking?*, WALL ST. J., Sept. 29, 2006, at A16.

Rights, and Labor: "[f]or almost three decades, these reports have been an essential element of the concerted efforts of successive Congresses and administrations to promote respect for human rights worldwide. The reports have served as . . . a foundation for our cooperative action with other governments, organizations, and individuals."¹⁰²

In *Sosa*, the Supreme Court warned against "collateral consequences" including "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."¹⁰³ In *Joo*, the D.C. Circuit panel instructed courts "to focus their [*Baker v. Carr*] analysis upon the particular question posed in terms of the history of its management by the political branches."¹⁰⁴ The State Department's Human Rights Reports, which the contingency fee lawyers hope to introduce as the basis for ATS class action complaints, are themselves the documents that demonstrate a history of management by the political branches. In *Mujica*, confronted with evidence that the Government preferred to handle the question posed by the lawsuit through diplomacy, not U.S. litigation, the court dismissed under the fourth *Baker* factor:

"However, the fourth *Baker* factor applies to the instant case because proceeding with the litigation would indicate a 'lack of respect' for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general. In reaching this conclusion, the Court pays particular attention to the fact that this case involves foreign relations, an area over which the Executive has a great deal of responsibility."¹⁰⁵

When a State Department Human Rights Report—or a series of such annual reports—demonstrates a history of management by the political branches of the question posed by an ATS class action lawsuit, the State Department's report may support dismissal of the ATS suit under the political question doctrine.

Moreover, the factual assertions contained in the State Department's annual Human Rights Reports are voluminous. They are catalogued to help the State Department achieve progress on the issues noted in the reports through diplomacy, not to provide a convenient depository of information for use by trial lawyers in bootstrapping these reports into

¹⁰² Statement in State Department press release, March 8, 2006, upon issuance of the Human Rights Report of 2005.

¹⁰³ *Sosa* at 727 (emphasis added).

¹⁰⁴ *Joo* at 49 (emphasis added) (internal citation omitted).

¹⁰⁵ *Mujica* at 1194.

class action complaints. Where progress is occurring through diplomacy, litigation can be counterproductive to the foreign policy interests of the United States.

6. Trial Lawyers Have No Place in the Conduct of Foreign Policy

In response to the Court's invitation for congressional guidance in *Sosa*, Senator Dianne Feinstein's bill, S. 1874, proposed barring ATS contingency fee lawsuits. The bill recognizes the incompatible tension that exists between profiteering trial lawyers, whose sole motivation is to produce large-scale money damages without regard for adverse impact on U.S. foreign relations, and the executive branch, which has a duty to conduct successful U.S. foreign relations in fulfillment of its constitutional obligations. Courts should pay particular deference to the executive branch when this tension exists.

Recently, the Supreme Court affirmed that even state governments are precluded from enacting laws that conflict with the conduct of U.S. foreign policy—notwithstanding that state governments, in contrast to contingency fee lawyers, are seeking to promote the public interest. In *Garamendi*, the Court struck down a statute passed by the California legislature that conflicted with the national Executive's diplomatic objectives: "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. . . . [O]ur thoughts on the efficacy of the one approach versus the other are beside the point. . . . The question relevant to preemption in this case is conflict."¹⁰⁶

CONCLUSION

Twenty-first century diplomacy is complex and volatile. Contingency fee ATS lawsuits are ill-suited as proxies for the responsible conduct of U.S. foreign relations by the executive branch. Now that the U.S. trial bar has targeted ATS lawsuits as a source of global mass tort class action liability, the U.S. Government should be especially vigilant in its efforts to prevent opportunistic expansion of the ATS; and courts should take judicial notice of the trend now occurring in the ATS global class actions, and, in the words of the Supreme Court in *Sosa*, conduct "vigilant doorkeeping."

¹⁰⁶ *Garamendi* at 427.

ABOUT THE AUTHORS

Arthur Fergenson is co-chair of the Appellate Practice Group at DLA Piper US LLP, where he is a partner. As a civil litigator for the last 20 years, he has appeared before state and federal courts throughout the United States. After graduating from Yale Law School, he clerked for a federal district judge in Manhattan, and then for Chief Justice Warren E. Burger of the U.S. Supreme Court. Mr. Fergenson was a federal prosecutor in the U.S. Attorney's Office in Maryland, and served on the faculty of the law schools of the University of Maryland and Indiana University (Bloomington). He currently serves as a member of the editorial board of *Business Law Today*, a monthly publication of the Business Law Section of the American Bar Association. He is admitted to the bars of New York, the District of Columbia, and Maryland.

John Merrigan is the co-chair of the Federal Affairs Practice Group at DLA Piper US LLP, where he is a partner. Mr. Merrigan began law practice in 1973 with Verner Liipfert, which merged with DLA Piper in 2002. *Chambers USA: America's Leading Lawyers for Business* places Mr. Merrigan in the top rank nationally in the practice of government relations law. From 1996 until 2000, Mr. Merrigan served as Chairman of the Democratic Business Council of the National Democratic Party. Mr. Merrigan currently serves on the Board of Advisors for the George Washington University Graduate School of Political Management and on the board of Children Uniting Nations, a foundation that fosters mentoring among inner-city children. He is admitted to the bar of the District of Columbia.

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