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FEATURE

International law claims

The impact of the Alien Tort Statute

On the last day of its 2003 to 2004 term, the US Supreme Court (the Court) issued a long-anticipated decision that will have a significant impact on lawsuits alleging violations of international law in US federal courts. At issue in the case, *Sosa v Alvarez-Machain* (*— US —, 2004 WL 1439873 (29 June 2004)*), was the meaning of a US federal statute commonly known as the Alien Tort Statute (ATS) or the Alien Tort Claims Act.

The ATS, enacted by the First US Congress in 1789, was largely forgotten for almost 200 years.

That changed in the late 1970s and early 1980s, when the ATS was seemingly rediscovered by the plaintiffs' bar, which began to employ it actively in lawsuits alleging so-called human rights violations mainly against government officials and regimes outside the US. Those lawsuits met with varying degrees of success as lower courts struggled with the ATS's cryptic text.

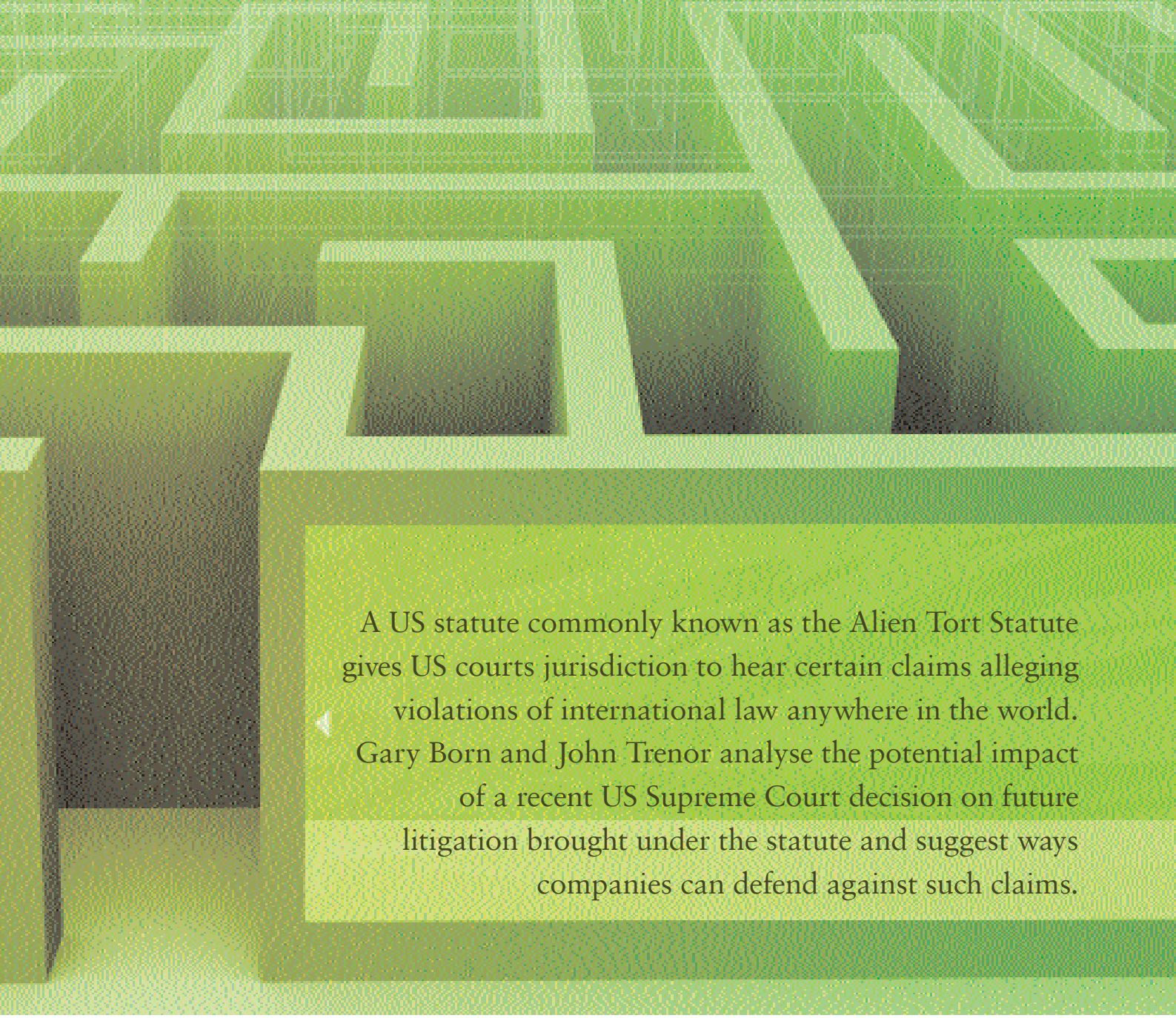
Beginning in the 1990s, plaintiffs increasingly invoked the ATS in lawsuits against companies for alleged violations of international law, often in disputes having little, if any, connection to the US. For example, the ATS has been invoked in litigation against:

- Oil and mining companies for alleged international environmental law violations or human rights abuses in the developing world.

- European, Japanese and US companies for alleged international law violations arising out of World War II.

- European and US companies for doing business in South Africa during the apartheid era.

Many of these claims involve, by their nature, controversial and sensitive allegations. The underlying legal standards in such cases are often ill-defined and disputed,



A US statute commonly known as the Alien Tort Statute gives US courts jurisdiction to hear certain claims alleging violations of international law anywhere in the world. Gary Born and John Trenor analyse the potential impact of a recent US Supreme Court decision on future litigation brought under the statute and suggest ways companies can defend against such claims.

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both at a national and an international level. The relevant facts are often old, difficult to ascertain and sensitive (particularly in the US-jury system). The public relations impact of such claims, and the need for management attention, often outweighs their legal merit. Indeed, there are no reported cases in which plaintiffs have been awarded damages in ATS litigation against a company. However, substantial numbers of US and non-US companies have become entangled in such litigation in recent years, with consequent costs and uncertainties.

In light of divergent views among lower courts, many in the legal community had hoped that the Court would resolve this confusion with its decision in the *Sosa* case. Regrettably, the Court's decision answered few questions about the scope of the ATS and instead left both US and non-US companies exposed to the continuing risks and uncertainties of international law claims in US courts. In view of this fact, this article:

- Sets out the provisions of the ATS and provides examples of the broad range of circumstances in which it has been invoked by claimants against companies.

- Considers attempts by the US courts to clarify the scope of the ATS, focusing in particular on the Court's recent decision in *Sosa*.

- Provides some guidance on how companies can defend against ATS claims and on what companies can do to minimise their exposure to such claims.

The ATS

The ATS was enacted in 1789 as part of the First Judiciary Act. The 18-word statute has been largely unaltered for the past two centuries and is now codified at 28 USC § 1350. It provides in full (as amended in minor respects): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law

Illustration: Getty Image

The growth of ATS litigation

Following its enactment in 1789, the Alien Tort Statute (ATS) was invoked twice before the close of the 18th century, both times in disputes regarding the capture of foreign vessels (*see Moxon v The Fanny, 17 F Cas 942, 943-44 (D Penn 1793)*). Over the next 150 years, plaintiffs invoked the ATS only a handful of times, primarily in cases involving maritime disputes.

By the 1960s, cases invoking the ATS in a wider variety of disputes began to trickle into US courts. In most of these early cases, however, courts declined to exercise jurisdiction under the ATS on the ground that plaintiffs' claims (ranging from a longshoreman's claims against a shipowner for negligence and unseaworthiness, to a Russian beneficiary's claim against an insurer for the proceeds on an insurance policy, to an investment trust's claims of fraud, conversion and corporate waste) did not allege violations of the "law of nations" (*Lopes v Schroder, 225 F Supp 292 (ED Pa 1963); Valanga v Metropolitan Life Ins Co, 259 F Supp 324 (ED Pa 1966); IIT Vencap, 519 F 2d 1001, 1015 (2d Cir 1975)*).

In 1976, the Second Circuit Court of Appeals affirmed the dismissal of an ATS claim by a former German citizen who alleged that several Germans had wrongfully confiscated his ownership interest in a banking firm during the Nazi era in violation of several treaties (*Dreyfus v Von Finck, 534 F 2d 24, 28 (2d Cir 1976)*). The appellate court dismissed the plaintiff's claim, holding that there was no international law violation because none of the treaties applied, but it also made a much more potentially far-reaching holding. It declared in no uncertain terms that the ATS does not create a private "cause of action" or right of action for a plaintiff to pursue his international law claims in court but merely provided jurisdiction for the court to determine whether such a cause of action existed from some other source.

Just a few years later, the same appellate court that decided *Dreyfus* breathed new life into the ATS in *Filartiga*, one of the first ATS cases alleging human rights violations (*Filartiga v Pena-Irala, 630 F 2d 876 (2d Cir 1980)*). In that case, two Paraguayans sued a former Paraguayan official alleging that they had been tortured in Paraguay in violation of international law. The court held that the ATS provided jurisdiction for plaintiffs' claims, which alleged "deliberate torture perpetrated under colour of official authority" because official torture "violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties." Despite the express ruling in *Dreyfus* that the ATS itself did not provide a cause of action, the *Filartiga* court was silent as to the basis for the plaintiffs' cause of action. The US Congress subsequently enacted legislation in 1992, the Torture Victim Protection Act, which expressly created a cause of action, subject to specified limitations, for torture and extrajudicial killing (*28 USC § 1350 note*).

The Second Circuit's ruling in *Filartiga* sparked a growing wave of ATS litigation in courts across the US by plaintiffs alleging purported human rights abuses around the world, at first primarily against government officials and regimes. The courts in these cases often responded by providing a US forum for plaintiffs' disputes even though in many of the

of nations or a treaty of the United States."

The ATS largely lay dormant for almost 200 years following its enactment. One of the most distinguished jurists in the US, Judge Henry Friendly, remarked in the 1970s that the ATS was a "legal Lohengrin": nobody seemed to know where it came from or what its purpose was (*IIT v Vencap, Ltd, 519 F 2d 1001, 1015 (2d Cir 1975)*). And, for most of its lifespan, nobody seemed to care.

That began to change, however, in the wake of a seminal case in 1980 in which two South American nationals invoked the ATS in a lawsuit alleging torture by a former government official in violation of international law. A number of lawsuits alleging other human rights violations soon followed (*see box, The growth of ATS litigation*).

Corporate targets

Although the focus of ATS lawsuits alleging human rights violations initially was government officials and regimes, by the 1990s plaintiffs increasingly began targeting corporate defendants, presumably because of their perceived deep pockets. In some instances, plaintiffs have alleged direct wrongdoing by the corporate defendants, while in many others they have sought to portray some link between the companies and the governments or regimes that have allegedly injured the plaintiffs, often asserting that the corporate defendants collaborated or did business with the governments or regimes that purportedly committed the atrocities.

For example, plaintiffs frequently have asserted claims against companies engaged in mining activities or oil exploration in developing countries for alleged human rights violations or environmental harm in such countries. In one such case, *Doe v Unocal*, currently pending before the Ninth Circuit Court of Appeals for consideration in light of the Court's decision in *Sosa* (*see below The Sosa decision*), Burmese villagers have sued an oil company with a stake in natural gas extraction activities and a related pipeline project in Myanmar, alleging that military personnel acting as a security force for the projects instituted a forced labour programme and subjected the villagers to murder, rape and torture (*Doe v Unocal, Nos 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir 18 Sept 2002), vacated by*

cases there was no nexus between the alleged wrongdoing and the US. Some of the most widely publicised cases included cases brought against:

- Libya and the PLO by survivors and representatives of victims of an attack by the PLO on an Israeli bus (*Tel-Oren v Libyan Arab Republic, 726 F 2d 774 (DC Cir 1984)*).

- Radovan Karadzic, the self-proclaimed leader of a Bosnian-Serb republic located within Bosnia-Herzegovina, by victims of atrocities there (*Kadic v Karadzic, 74 F 3d 377 (2d Cir 1996)*).

- Former Philippine President Ferdinand Marcos by Philippine nationals alleging they or their relatives had been detained, tortured or executed under his rule (*In re Estate of Ferdinand Marcos Human Rights Litigation, 94 F 3d 539 (9th Cir 1996)*).

Dozens of other ATS lawsuits alleging human rights violations around the world were filed.

While courts in many of these cases recognised the ATS as a basis for jurisdiction (authorising federal courts to hear such claims), they split on whether the ATS also provided a cause of action (authorising plaintiffs to seek a remedy in court from another).

Some courts, reading the ATS faithfully to its text, held that the ATS was jurisdictional only and thus "merely serves as an entrance into the federal courts and in no way provides a cause of action to any plaintiff" (*Jones v Petty Ray Geophysical Geosource, Inc 722 F Supp 343, 348 (SD Tex 1989)*).

Other courts gave an expansive reading to the statute and held that the ATS provided plaintiffs with the private right of action necessary to seek a remedy in court. Perhaps realising the flood of lawsuits that might result from such a ruling, these courts quickly sought to impose limits on what claims the ATS would support by imposing a number of judicially-created limitations on such litigation. For example, a number of courts held that the alleged norm of international law must be "clear and unambiguous" or "specific, universal, and obligatory" (*Filartiga v Pena-Irala, 630 F 2d 876 (2d Cir 1980); In re Estate of Marcos Human Rights Litigation, 25 F 3d 1467, 1475 (9th Cir 1994)*).

Some courts also required some sort of governmental or "state action" by the defendant for the majority of alleged international law violations in light of public international law's traditional focus on relations among nations and not individuals. Those courts requiring such "state action" by the defendant began recognising exceptions to their new rule, for example, for the "handful of crimes," such as slave trading, to which "the law of nations attributes individual liability" (*Tel-Oren v Libyan Arab Republic, 726 F 2d 774 (DC Cir 1984) (Edwards, J, concurring opinion)*). Another court expanded that list to include genocide and war crimes, as well as such crimes as rape, torture and summary execution, when committed "in pursuit of genocide or war crimes" (*Kadic v Karadzic, 70 F 3d 232, 243-44 (2d Cir 1995)*).

Doe v Unocal Corp, Nos 00-56603, 00-56628, 2003 WL 359787 (9th Cir 14 Feb 2003)). The plaintiffs have argued that the oil company's alleged hiring of military personnel to provide security and build infrastructure makes it liable for atrocities carried out by the military against the villagers.

Similarly, residents of Ecuador, Peru, Nigeria, Papua New Guinea and the Sudan have filed suits invoking the ATS against other oil or industrial companies related to activities in those countries (*see, for example, Jota v Texaco, Inc, 157 F 3d 153 (2d Cir 1999); Wiwa v Royal Dutch Petroleum Co, 226 F 3d 88 (2d Cir 2000); Sarei v Rio Tinto PLC, 221 F Supp 2d 1116 (CD Cal 2002); Presbyterian Church of Sudan v Talisman Energy, Inc, 244 F Supp 2d 289 (SDNY 2003)*).

Other examples of ATS litigation against corporate defendants abound, including:

- Actions brought against a host of companies alleging human rights abuses, confiscation of property, and other purported international law violations stemming from World War II and the apartheid era in South Africa (*see, for example, Iwanowa v Ford Motor Co, 67 F Supp 2d 424 (DNJ 1999); In re South Africa Apartheid Litigation, MDL 1499)*).

- *Bigio v Coca-Cola Co* (*239 F 3d 440 (2d Cir 2001)*), where plaintiffs alleged that Coca-Cola violated international law when it purchased property in Egypt once owned by the plaintiffs and later nationalised by the Egyptian government.

- *Abdullahi v Pfizer, Inc*, (*No 01 Civ 8118, 2002 WL 31082956 (SDNY 17 September 2002)*), where Nigerian nationals sued a pharmaceutical company, alleging that it violated international law when it purportedly administered experimental antibiotics to patients without their consent during epidemics of bacterial meningitis, measles and cholera in that country.

The Sosa decision

Although courts had generally recognised the ATS as a basis for jurisdiction (authorising federal courts to hear such claims), they split on whether the ATS also provided a cause of action (authorising plaintiffs to seeks a remedy in court from another) (*see box, The growth of ATS litigation*). The Court finally addressed this split among lower courts in *Sosa*.

Managing exposure: steps to consider

While a detailed discussion of the steps that companies can take to manage their exposure to litigation under the Alien Tort Statute (ATS) is outside the scope of this article, examples of measures that may be considered range from:

✓ Analysing in advance the legal and market-based risks involved in investing in a particular country or region.

✓ Implementing, in a co-ordinated way, a compliance programme designed to manage identified legal and reputational risks.

✓ Considering whether it is possible to structure the company's operations in such a way as to minimise the likelihood that subsidiaries doing business outside the US in particular countries are subject to personal jurisdiction in US courts. This will not necessarily prevent the company's affiliates from being named as defendants in ATS litigation by claimants who often seek to cast a wide net, but it could increase the prospects of an early dismissal on personal jurisdiction grounds.

✓ Implementing a corporate social responsibility policy. Again, however, this will not immunise companies from ATS litigation. Indeed, many of the defendants in the pending litigation against companies that did business in South Africa during the apartheid era were signatories to the Sullivan Principles, an anti-apartheid code of corporate conduct.

In its decision, the Court rather quickly dispensed with the notion that the ATS provides a private right of action, concluding that the ATS is a jurisdictional statute creating no new causes of action. Noting that the ATS is in terms only jurisdictional, the Court held that the plaintiff's reading of it as authority for the creation of a new cause of action for torts in violation of international law was simply "implausible." Despite the clear grant of jurisdiction set out in the ATS, the Court noted that for over 170 years after its enactment the ATS provided jurisdiction in only one case, until the 1970s.

Although the Court held that the ATS itself does not provide any private right of action, it concluded (with remarkably little support, given the complete lack of any legislative history on the statute) that the ATS's jurisdictional grant was enacted on the understanding that federal common law (that is, judge-made law) would provide a cause of action for the "modest number of international law violations with a potential for personal liability at the time" that the ATS was enacted in 1789. According to the Court, the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.

The Court conceded that there was no relevant legislative history from which to determine the meaning of the ATS but nevertheless surmised that "history" does tend to support two propositions. First, the Court surmised that the First Congress in 1789 did not enact the ATS as an empty jurisdictional provision dependent on future authorisation of causes of action. The Court noted that it would have been more than "strange" for the First Congress to vest federal courts expressly with jurisdiction to entertain certain claims alleging violations of the law of nations, but only if Congress subsequently legislated a cause of action. It also noted that there is "too much in the historical record" to believe that Congress would have enacted the ATS "only to leave it lying fallow indefinitely". The Court provided little evidence for this first historical proposition.

Second, the Court surmised that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. The Court pointed to even less evidence for this second proposition. Citing Sir William Blackstone's comments in a very different context (namely, criminal law), the Court concluded that foremost in the minds of those in the First Congress appears to have been:

- Offences against ambassadors.
- Violations of the right of "safe conduct", that is, safe passage through certain territory.
- Actions arising out of prize captures and piracy.

All of these offences threatened serious consequences in international affairs. The Court then stated that the common law in 1789 appears to have recognised only these three international law claims as "definite and actionable". It further noted that the sparse contemporaneous case law and legal materials tend to confirm that some, but few, torts in violation of the law of nations were understood to be within the common law at the time the ATS was enacted.

Limitations on ATS litigation and possible defences

Although the Court was unanimous that the ATS is solely a jurisdictional act, it acknowledged disagreement on the extent to which judge-made common law may recognise further causes of action that would support claims for violations of international law in addition to the three norms recognised at the time of the ATS's enactment in 1789. In the minority, Justice Scalia stated that he would have closed the door to any further independent judicial recognition of actionable international norms, limiting the scope of ATS litigation to those three 18th century norms, namely offences against ambassadors, violations of safe conduct, and piracy.

In contrast, the six-Justice majority of the Court held that "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today". The majority of the Court thus assumed, without explanation, that in enacting the ATS in 1789 the First Congress intended the legislation to extend to new causes of action as international law itself developed over the years. The Court emphasised that a plaintiff's claim must be gauged against the current state of international law.

The Court did not define with any precision just what norms of international law might be recognised by common law today. Nevertheless, a number of considerations can be adduced from the *Sosa* decision and elsewhere that could help to guide lower courts in delimiting the scope of pending and future ATS litigation. These include:

• **The international law norm must be accepted by the civilised world and defined with specificity.** To assist lower courts in defining the "narrow set of violations of the law of nations" recognised by common law today, the Court stated that courts should require any claim based on the present-day law of nations to rest on a norm of international character "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized". The Court explained that federal courts should not recognise private claims under federal common law for violations of any international norm "with less definite content and acceptance among civilised nations than the historical paradigms familiar when [the ATS] was enacted". It added, somewhat cryptically, that the determination of whether a norm is sufficiently definite to support a cause of action "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause of action available to litigants in federal court".

There will no doubt be substantial litigation concerning the meaning of these standards, and their application to particular alleged international law norms, as well as prolonged lobbying by claimants and their representatives in international fora to position evolving international law norms for use in ATS litigation. The perceived rewards of the US legal system (including a liberal discovery system, jury trials and no fee-shifting) ensures sustained efforts to develop legal doctrine to be employed in ATS litigation.

• **The specificity of the norm should be assessed in light of the particular defendant.** The Court suggested that, if the defendant is a private actor such as a company or individual, lower courts should assess whether international law extends the scope of liability for a violation of a given norm to such private actors. This limitation may be particularly significant for companies, to the extent that plaintiffs may find it difficult to establish that a norm of international law has been extended with the requisite degree of specificity to assign liability to corporate entities. Before the *Sosa* decision, many lower courts had imposed a "state action" limitation on many norms of international law, narrowing the scope of such norms under the ATS to those defendants that engaged in some governmental or quasi-governmental conduct (*see box, The growth of ATS litigation*).

• **Courts should exercise great "judicial caution" in creating new causes of action.** The Court repeatedly cautioned lower courts against recognising new causes of action beyond these narrow limitations for a "series of reasons" outlined by the Court. Among these reasons, the Court expressed concern regarding the discretionary nature of judge-made common law and advised that courts primarily look for legislative guidance. The Court also emphasised the possible collateral political consequences of making international rules privately actionable, as well as the potential implications for US foreign relations of recognising new causes of action.

• **The US Congress may explicitly or implicitly reject norms as actionable.** The Court noted that the US Congress may "shut the door to the law of nations" at any time with respect to a purported norm either explicitly or implicitly by treaties or statutes that "occupy the field" and thus preclude additional judge-made law. The Court also recognised that Congress may modify or cancel any judicial decision after the fact to the extent it recognises an international norm.

• **The norm must be binding.** The Court reiterated that customary international law is found in the "customs and usages of civilized nations" and as evidence of these, courts should look to "the works of jurists and commentators, who by years of labour, 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".

As a result, the Court rejected the plaintiff's reliance in *Sosa* on two well-known international agreements that, "despite their moral authority, have little utility under the standard set out in this opinion". The Court rejected the plaintiff's reliance on:

- the Universal Declaration of Human Rights, because it did not impose obligations as a matter of international law; and

- the International Covenant on Civil and Political Rights, because it was ratified by the US on the express understanding that it was not self-executing and so did not itself create binding obligations enforceable in federal courts.

The Court arguably also cast doubt on over-reliance on the purported norms of international human rights law set out in the Restatement (Third) of Foreign Relations Law of

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the United States (1987), which it noted were "only the beginning of the enquiry" in determining whether a purported norm was defined with the requisite specificity.

• **The lack of uniform adherence may suggest the lack of an international law norm.** The Court suggested that the more often a purported norm is violated, the less likely that norm reflects the law of nations. It explained that violations of a rule do not "logically foreclose" the existence of that rule as binding international law but should counsel lower courts from creating a new judge-made private cause of action to enforce a rule that has not realised more widespread adherence.

• **The standards adopted by some lower courts prior to *Sosa* do not survive the Court's decision.** In a footnote, the Court rejected the plaintiff's reliance on certain lower federal court cases because they reflected "a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today". Unfortunately, the Court did not identify which standards it was rejecting.

• **The plaintiff may first need to exhaust local remedies outside the US.** The Court emphasised that the requirement of a clearly defined norm is not the only principle limiting the availability of relief in the federal courts for violations of customary international law. For example, the Court stated that, in an appropriate case, it would "certainly consider" a requirement that the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals, before seeking relief in a US court.

• **There may be further limitations imposed by US foreign policy considerations.** The Court suggested that another possible limitation was "a policy of case-specific deference to the political branches". It noted, as an example, pending litigation against companies that did business in South Africa during the apartheid regime in which both the South African and US governments have informed the lower court that the litigation interferes with important government policies. In such cases, the Court stated 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.

• **There may be a limitation imposed by international comity.** In a concurring opinion, Justice Breyer suggested that courts should consider whether the exercise of jurisdiction under the ATS is "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement". Justice Breyer explained that international comity considerations arise, in particular, when claimants injured outside the US file suit in the US under the ATS, asking the courts to recognise a claim that a specific type of conduct outside the US violates an international norm.

In addition to the limitations expressly identified by the Court in

Sosa, there are a number of additional defences, common to all litigation, which may be asserted in response to an ATS claim, depending on the circumstances. For example, a defendant could:

- Argue that the US court lacks personal jurisdiction over it, on the grounds that the defendant has insufficient contacts with the US either with respect to the specific claims asserted (for example, the conduct and harm alleged occurred outside the US) or with respect to the defendant generally (for example, the defendant is not incorporated in, does not transact sufficient business in, and does not solicit business in the US).

- Assert the defence of *forum non conveniens* (inconvenient forum), on the grounds that there is an adequate alternative forum outside the US and, in light of the interests of the parties and the public interest, it would be more convenient to litigate the claims in that alternative forum.

- Assert the defence of failure to state a claim on which relief can be granted if the plaintiff has failed to allege facts that, even if true, would support a claim against the defendant for a violation of international law.

Managing exposure

Many in the legal community had hoped that the Court's decision in *Sosa* would address the difficulties that had arisen in applying the ATS. Unfortunately, the Court did not fully resolve the uncertainties associated with the statute and arguably exacerbated them. Although it clarified the central issue of whether the ATS is jurisdictional only, the Court expressly left the "door ajar" to international law claims, while providing limited guidance to lower courts on the limits of such litigation. The Court directed lower courts to engage in "vigilant doorkeeping" but declined to define the dimensions of that door.

Over the past few years, there has been discussion by various business associations and others of the need for legislative reform by the US Congress. One business association has called legislative reform of the ATS a major priority, noting that abuse of the statute by claimants can be a significant disincentive to trade and foreign investment. However, in light of the politics of the US legislative process, any effort to amend or repeal the ATS carries its own risks.

In the absence of significant legislative reform, US and non-US companies will continue to be exposed to the risks and uncertainties of international law claims in US courts as lower courts interpret the *Sosa* decision. Although such exposure cannot be completely avoided, there are certain steps that companies can take to minimise it (*see box, Managing exposure: steps to consider*). However, those companies that do find themselves named in ATS litigation must grapple with the *Sosa* decision and the limited guidance that the Court provided there to help lower courts define the limits of this cryptic statute.

Gary B Born and John A Trenor are partners in Wilmer Cutler Pickering Hale and Dorr LLP's London office.