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12
 13 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 14 **OAKLAND DIVISION**

15 WANG XIAONING, YU LING, SHI TAO,
 and ADDITIONAL PRESENTLY
 16 UNNAMED AND TO BE IDENTIFIED
 INDIVIDUALS,

17 Plaintiffs,

18 v.

19 YAHOO, INC., a Delaware Corporation,
 YAHOO! HOLDINGS (HONG KONG),
 LTD., a Foreign Subsidiary of Yahoo!,
 20 ALIBABA.COM, INC. a Delaware
 Corporation, AND OTHER PRESENTLY
 21 UNNAMED AND TO BE IDENTIFIED
 INDIVIDUAL EMPLOYEES OF SAID
 22 CORPORATIONS,

23 Defendants.

Case No. C07-02151 CW

TORT DAMAGES CLAIM

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' MOTION FOR AN EARLY
 CASE MANAGEMENT CONFERENCE AND
 ORDER**

Date: July 2 or 26, 2007 (Proposed)

Time: TBD

Location: Courtroom 2

Judge: Hon. Claudia Wilken

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The Internet in China: A Tool for Freedom or Suppression?, p. 156, *available at* http://commdocs.house.gov/committees/intlrel/hfa26075.000/hfa26075_of.htm 11

1 procedures should be allowed to proceed and to accomplish their purposes before alternative,
2 extraordinary methods of the type the Defendants propose are applied.

3 Plaintiffs note, at the outset, that the July 26 date being proposed for the special
4 Conference is just one day earlier than the date (July 27) originally set for the Initial Case
5 Management Conference by the Court. The Defendants successfully sought a change in this July
6 27 date just a few days ago on the basis of the Defendants' attorneys' vacation and travel plans.
7 Why, if the underlying goal of the defendants was anything other than to unnecessarily delay and
8 add to the complexity of the case management process, are the Defendants now seeking an
9 additional case management conference on July 26, instead of using the originally scheduled
10 conference of July 27 to deal with these matters? Why a change in that date was required in the
11 first place given the present Motion for the second change, has not been adequately or logically
12 explained or justified.
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15 With respect to the merits of the issues and concerns that the Defendants cite, Plaintiffs
16 note initially that all (or certainly the vast majority) of these matters would and should be raised
17 as part of the regular case management and ADR process. The purpose of the ADR and case
18 management procedures is precisely to provide an efficacious means for the Parties to share and
19 discuss the information and issues that advance the litigation process, to identify the issues in
20 contention, and to provide the Court with a summary of the information and arguments that are
21 needed to decide how the case should best be handled, and hopefully, resolved. Plaintiffs believe
22 that the true motivation of the Defendants, first in seeking a postponement in the case
23 management schedule generally, and now in asking for a fractured (or bifurcated as the
24 Defendants describe it) approach to the case management process is, pure and simple, to
25 unnecessarily delay the progress of the litigation. This underlying goal is indicated most directly
26 by their request to have discovery and the regular case management process "suspended" until the
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1 views of the United States government on the case can be solicited and obtained.

2 Rather than adopt the Defendants' piecemeal approach, whose primary purpose appears to be
3 to delay the effective completion of the case management process, Plaintiffs urge the Court to
4 reject the Defendants' Motion in its entirety, and to maintain the newly rescheduled case
5 management schedule as ordered by the Court on June 19, with the September 18 Initial Case
6 Management Conference used to consider any issues that have been (and will be) raised, and to
7 decide how they best should be handled, after the full benefits of the ADR and case management
8 process have been brought to bear on these matters, as intended by the Court's regular Rules and
9 procedures.
10

11 **II. Many Of The Underlying Arguments Upon Which The Defendants Base Their**
12 **Request For An Alternative Case Management Process Are Based Upon Incorrect**
13 **Assumptions or Mischaracterizations**

14 Defendants request an alternative approach to the case management process that features
15 "bifurcating certain issues," "soliciting statements of interest from the political branches" of the
16 U.S. Government, and placing "a hold on discovery" and other elements of the regular pre-trial
17 and case management process while these initial procedures are completed. Def. Yahoo! Inc.'s
18 Mot. for an Early Case Mgmt. Conference and Order 1:4, 1:24 (filed June 21, 2007). (hereinafter
19 "Def. Mot."). Plaintiffs are unalterably opposed to this proposed approach, the substantial delays
20 in the litigation process that it inherently is designed to produce, and its effect of undercutting and
21 bypassing the regular case management process that has already been approved and scheduled by
22 the Court and previously changed at the Defendants' behest. Plaintiffs point out that many of the
23 proposals are based upon incorrect assumptions and mischaracterizations, placing into serious
24 question the need and justification for the highly unusual procedures and variations from
25 established court practice that the Defendants request.
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1 **A. Defendants Incorrectly Assume that Plaintiffs Will Be Inaccessible for Evidentiary**
2 **Purposes**

3 To provide just a few examples of the incorrect assumptions and mischaracterizations that
4 form the foundation for the Defendants' Motion, they suggest on page 2, lines 2-6 of their Motion
5 that the Plaintiffs cannot "prosecute this case...in light of the circumstances that they cannot give
6 testimony or communicate with their counsel." Def. Mot. 2:4-6. Neither of these assumptions is
7 correct. One of the Plaintiffs in the case, Yu Ling, came to the United States from China when
8 the complaint was filed. Another potential Plaintiff, the mother and legally designated
9 representative of Plaintiff Shi Tao, also traveled to South Africa and then to the U.S. from China
10 in the past few weeks to accept the Committee to Protect Journalists' Golden Pen International
11 Press Freedom Award on behalf of her son, and to check on the status of the present case by
12 stopping in the U.S. on her trip back to China. While communication with and access to those
13 Plaintiffs being detained in China most certainly is restricted and heavily monitored and censored,
14 they do communicate with their family members, and through them with their counsel, including
15 their Chinese lawyers who have been representing them (to little avail) in that country. Nor do
16 we believe that it is appropriate for the Defendants to seek to cite the unlawful detention and
17 communications restrictions imposed on Shi Tao and Wang Xiaoning as a basis for claiming that
18 their lawsuit cannot be carried out in U.S. courts, and for seeking dismissal of their claims.

19 As with so many of the other issues the Defendants seek to cite as justification for the
20 "alternative" forms of case management they are proposing, the question of how problems
21 associated with limited access to some of the Plaintiffs impacts the litigation is not one that can or
22 should be handled summarily. This question requires exactly the kind of detailed information
23 disclosure and discussion between the Parties that the regular case management system is
24 designed to produce, so that the Court will have the information, documentation and legal
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1 analyses necessary to properly evaluate and make decisions on these matters for case
2 management purposes.

3 **B. Defendants' Motion Mischaracterizes the Standing Order as Describing the Case**
4 **Management Process Itself, When in Fact It Only Describes the Contents of the**
5 **Parties' Reports Subsequent to Those Procedures**

6 A second example of the incorrect and inaccurate assumptions underlying the Defendants'
7 Motion is their citation to sections 15, 16, and 20 of the Standing Order for All Judges of the
8 Northern District of California on the Contents of the Joint Case Management Statement. *See*
9 Def. Mot., Standing Order for All Judges of the N.D. Cal., Contents of Joint Case Mgmt.
10 Statement (effective Mar. 1, 2007). That Standing Order refers to the information that the Parties
11 must include in the Case Management Statement to be submitted to the Court (due on September
12 7th in the present case under the Jointly Stipulated Schedule approved by the Court on June 19th).
13 These are not guidelines on how the case management system should be handled, as the
14 Defendants imply, but rather on what the contents of the Parties' reports (joint or separate) to the
15 Court on the Case Management Process must cover. By definition, that report cannot be filed
16 until after the case management process has (at least partially) taken place, initial disclosures and
17 discussions have occurred, and issues in dispute identified and addressed (at least initially) by the
18 parties. Those are exactly the steps, mandated by the Court's Standing Order and regular case
19 management procedures, that the Defendants are seeking to bypass, undercut, and substantially
20 delay through the proposals they have made. Their proposals therefore must be recognized as
21 being inconsistent with the Standing Order and the case management process, not in furtherance
22 of these procedures.
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25 **C. Defendants' Motion Misinterprets the *Sosa* Vigilant Doorkeeping Requirement by**
26 **Incorrectly Implying that Plaintiffs' Claims Fall Outside of the Narrow Class of**
27 **Claims Suitable for ATCA Cases**

28 The vigilant door-keeping "cautions" expressed in *Sosa* do not apply to cases such as this

1 where the human rights violations cited as the bases for the claims, such as torture and long-term
2 arbitrary detention, have been fully recognized and accepted by Congress and by the courts as
3 appropriate foundations for ATCA and TVPA lawsuits. The Supreme Court in its *Sosa* decision
4 made crystal clear that the weighing of political and foreign policy concerns was not appropriate
5 in the special category of cases, such as those arising under the TVPA, where a very explicit
6 determination had been made by Congress that U.S. courts were authorized to exercise
7 jurisdiction and make determinations in cases involving torture abuses.

9 Defendants incorrectly suggest that an early Case Management Conference and the adoption
10 of a “tailored” or “bifurcated” Case Management Order will fulfill the “duty of ‘vigilant
11 doorkeeping’ to make sure ATS claims fall within the ‘narrow class’ of claims allowed,” that the
12 Supreme Court described in *Sosa*. Def. Mot. 3:17-19 (citing *Sosa v. Alvarez-Machain*, 542 U.S.
13 692 (2004)). However, the very same case law cited by Defendants as justification for their
14 argument says exactly the opposite. This case precedent confirms that Plaintiffs’ allegations
15 clearly fall within this “narrow class” of actions that the courts have recognized as justiciable.
16 *Sosa*, 542 U.S. at 729.

18 Defendants’ motion implies that *Sosa*’s doorkeeping requirement precludes cases raising
19 political questions, whereas *Sosa* only holds that doorkeeping is required to evaluate whether or
20 not an allegation brought under ATS falls under a clear and well-accepted norm of customary
21 international law, and whether the balancing tests called for under *Baker v. Carr* and *Sabbatino*
22 have been met. *Sosa*, 542 U.S. at 733 n.21. Defendants cite two cases as a means of defining the
23 bounds of this “narrow class.” See Def. Mot. 3 (citing *Sosa*, 542 U.S. at 692 and *Doe v. Qi*, 349
24 F. Supp.2d 1258 (N.D. Cal. 2004). *Sosa* states that an ATS allegation that is a violation of well-
25 established and universally accepted human rights standards is justiciable, and specifically
26 recognizes torture as a violation of the law of nations that meets these standards. *Sosa*, 542 U.S.
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1 at 762. Following *Sosa*, the District Court for the Northern District of California has stated that
2 “it is well established that torture constitutes *jus cogens* violations.” *Qi*, 349 F. Supp.2d at 1296
3 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992)). *Qi*
4 further found that arbitrary detention and cruel, inhuman or degrading treatment are also
5 actionable under ATS. *Qi*, 349 F. Supp.2d at 1296. Thus, the claims at issue in the present case
6 cannot be dismissed as the Defendants suggest simply because they have political or foreign
7 policy overtones.

9 It would be a waste of this court’s and both parties’ time to adopt the tailored Case
10 Management Order proposed by Defendants when the cases cited by Defendants as justification
11 for the appropriateness of such a plan clearly state that Plaintiffs’ specific allegations fall squarely
12 within the “narrow class of claims allowed” to be brought under ATS. Moreover, it is generally
13 the role of the courts, not the executive, to interpret the law of nations and thus whether or not a
14 specific violation is actionable under ATS. The Supreme Court in *Sosa* did note the possibility of
15 “case-specific deference to the political branches” where interference with a special mechanism
16 (the South Africa Truth and Reconciliation Commission for example) that had been established
17 locally to resolve those types of claims would result from a U.S. court action. *Sosa*, 542 U.S. at
18 733 n. 21. The district court held that the U.S. claims would directly “interfere with policy
19 embodied by [South Africa’s] Truth and Reconciliation Commission,” a stance which the U.S.
20 endorsed both as a matter of foreign policy and via a Statement of Interest (hereafter “SOI”) to
21 the court. *In re South African Apartheid Litigation*, 238 F. Supp.2d 1379 (JPML 2002)).

22 However, unlike the plaintiffs in the *Apartheid* case, the Plaintiffs in the instant case seek relief
23 for claims which are not justiciable in any form in China, let alone in a form that has been
24 endorsed by the United States. In enacting the ATCA and especially the TVPA, Congress made
25 clear its intention to provide a judicial forum in the U.S. for dealing with claims involving torture
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1 abuses, and that these types of claims should not be precluded because of foreign policy
2 overtones. Defendants are misapplying and misconstruing the statements in *Sosa* when they
3 suggest that the *Sosa* standards preclude this lawsuit.

4 **D. Defendants Misrepresent Plaintiffs' Purpose in Initiating This Litigation**

5 Defendants claim that the Plaintiffs' case "challenges several decades of U.S. foreign policy
6 toward China, in that one of its stated aims is to curtail American investment in China," similarly
7 grossly mischaracterizes reality. Def. Mot. 3:24-25. Plaintiffs have brought these claims, not to
8 curtail investment in China as Defendants claim, but to both obtain relief for the abuses they have
9 suffered as a result of Defendants' actions and to encourage other companies operating in
10 oppressive regimes such as China to think carefully and conscientiously about how to responsibly
11 do business in these countries without enabling the most serious form of abuses that these regimes
12 inflict upon their citizens. Nor are Plaintiffs "challenging" decades of U.S. foreign policy. If
13 anything, the lawsuit confirms and supports ongoing efforts by the U.S. Government to bring
14 attention to and to present these abuses, including the annual State Department human rights
15 country reports that single out China for special criticism of their arbitrary detention and torture
16 practices.
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19 **III. The Issues Raised by the Defendants Require the Further Factual and Issue**
20 **Development that the Regular Case Management Process Is Designed To Provide**

21 Since the Defendants have sought in their Motion to bring a number of important issues
22 and questions to the Court's attention, Plaintiffs feel obliged to quickly highlight a few key points
23 in response, not to address and explore these issues in depth, or to seek resolution of these matters
24 at this point in the process, but to further indicate the premature nature of seeking a conference
25 with the Court to address them on an earlier basis, and the value and importance of maintaining
26 and carrying out the regular case management process to develop these issues for proper and
27 more complete presentation to the Court. Proper treatment of these issues requires the more

1 informed factual and analytical basis that the case management system offers, even for
2 preliminary discussions regarding the proper handling of these issues in early stages of the
3 litigation process. Among the specific issues identified by the Defendants as justification for
4 seeking an early conference that demonstrate why that approach would be premature, and why the
5 regular case management process is needed to properly address these matters on a more effective
6 basis are those described below:
7

8 **A. The Defendants' Personal Jurisdiction Challenges Are Not Conclusive, and**
9 **Require Further Factual Development and Legal Analysis Through the Regular**
10 **Case Management Process and/or Preliminary Discovery**

11 Defendants seek to raise a number of issues or questions concerning whether the Court can
12 exercise personal jurisdiction over various Yahoo! entities. These matters cannot be resolved as
13 simply as the Defendants suggest. Due to the complex corporate structure of Yahoo!, Inc. and its
14 affiliates, major changes in the organizational structure that have taken place in recent years
15 (perhaps in part with a view towards attempting to shield various corporate entities from liability)
16 and the difficulty in finding much of the critical information regarding the organizational
17 structures and responsibilities of the entities in the public domain, some limited preliminary
18 disclosure and factual development is required before the Court can properly consider these
19 issues. A useful analogy that can be drawn is to the authority of courts to order discovery on
20 jurisdictional issues even before the court has determined whether it has personal jurisdiction over
21 a particular defendant. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de*
22 *Guinee*, 456 U.S. 694 (1982) (allowing discovery aimed at establishing foreign company's
23 contacts with the forum state); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d
24 1280, 1285 n.1 (9th Cir. 1977); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406,
25 430 n.24 (9th Cir. 1977) (stating that discovery "should be granted where pertinent facts bearing
26 on the question of jurisdiction are controverted...or where a more satisfactory showing of the
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1 facts is necessary”) (internal citation omitted). The Court should allow the fact development and
2 disclosure process of the case management system to run its course, or provide for some type of
3 preliminary discovery to take place, before trying to address these complex jurisdictional
4 questions. The Defendants’ suggestion that the Court can summarily address these issues on an
5 early basis without providing an opportunity to develop the necessary factual information through
6 the case management process makes no logical sense.
7

8 **B. The Regular Case Management Process Will Best Facilitate the Fact Finding Process**
9 **Necessary to Demonstrate the Impropriety of the Defendants Disclosing Internet**
10 **User Information to Chinese Authorities**

11 Similarly, Defendants’ suggestion that they were obliged to comply with information requests
12 from law enforcement authorities in China, and that their actions in this regard were necessary
13 and lawful, requires a far more in-depth analysis than Defendants suggest. The issues relating to
14 Defendants’ actions in complying with Chinese authorities’ requests for personal information of
15 internet users is very complex and will require the benefit of the regular case management process
16 to reveal the extent to which such requests were legitimate, whether Defendants had reason to
17 know that complying with those requests would produce major human rights abuses, and whether
18 their approach comported with accepted business practices and U.S law. The fact finding and
19 discussion that will occur during the regular case management process will make it possible to
20 determine what the prevailing and reasonable industry practices of other companies doing
21 business in repressive countries might be, and will reveal the extent to which Defendants’ actions
22 deviated from such reasonable standards. For example, at a hearing before the U.S. House of
23 Representatives Committee on International Relations on February 15, 2006, Jack Krumholtz,
24 Managing Director of Federal Government Affairs and Associate General Counsel of Microsoft
25 Corporation, testified that his company follows the practice of making sure that “[c]ustomers’
26 personal information is stored on servers located in the United States, so requests for that
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1 information from the Chinese have to be handled under procedures that are provided under the
2 U.S.-China Mutual Legal Assistance Treaty” and pursuant to U.S. law. *The Internet in China: A*
3 *Tool for Freedom or Suppression?*, p. 156, available at
4 http://commdocs.house.gov/committees/intlrel/hfa26075.000/hfa26075_of.htm. Elliot Schrage,
5 Vice President for Corporate Communications and Public Affairs, Google, Inc., also testified to
6 this issue, noting that Google “made a fundamental, strategic decision that we were not going to
7 offer services like G-mail or Blogger, services that provide us commercial value, . . . [and] that
8 we would not provide those services inside of China because we did not want to be put in a
9 position where we would have possess[ion] of data that might create the kinds of problems we are
10 discussing today.” *Id.* at 157 (referring to “privacy and confidentiality of information”). The
11 transcript of this hearing provides an apt illustration of how other companies, similarly situated to
12 Defendants, took affirmative steps to avoid compromising users’ private information in order to
13 avoid, as Mr. Schrage put it, “be[ing] in a position to give it,” and place these users in jeopardy.
14 *Id.* The regular case management process must be adhered to in order that both Parties be
15 afforded the opportunity through initial fact gathering and disclosures to fully explore whether the
16 acts of the Defendants in providing the information to China should be considered reasonable and
17 appropriate under the circumstances.

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21 **IV. Solicitation of the Views of the Political Branches of the U.S. Government On This**
22 **Case Would Not Be Appropriate and Would Not Justify The Requested**
23 **“Suspension” of the Case Management Process**

24 One of the “bifurcated” procedures that the Defendants seek to press upon the Court in
25 place of the regular case management process would be to solicit the views of the “political
26 branches” of the U.S. Government on the case (Def. Mot. 3:10), and to suspend the discovery and
27 case management process until these views can be obtained. In support of this approach they cite
28 the potential for the case to “impact foreign relations,” and the claim that the case “challenges

1 several decades of U.S. foreign policy towards China.” *Id.* at 3:23-24. They also cite the
2 Supreme Court’s urging of “caution” in passing judgment on the acts of sovereign governments
3 and foreign officials in the case of *Sosa v. Alvarez-Machain*. *Sosa*, 542 U.S. at 692. All of these
4 arguments are misleading and misplaced and do not constitute a valid basis for “suspending” the
5 litigation as has been requested.

6
7 This case has been filed against Yahoo! Inc. and its affiliates, not against the Government
8 of China or its officials. To the extent that the actions of the Government of China relate to the
9 litigation, or that the case impacts foreign relations, these matters must be assessed pursuant to the
10 standards that the U.S. Supreme Court set out in the cases of *Baker v. Carr*, 369 U.S. 186 (1962),
11 and *Sabbatino v. Banco Nazionale de Cuba*, 376 U.S. 398 (1964), recognizing that U.S. Courts
12 retain jurisdiction over legal disputes despite potential political or foreign relations implications
13 where clear and well-established legal standards are applicable to the matter in dispute that courts
14 traditionally are called upon to apply. Nor do these supposed foreign policy issues implications
15 justify suspension of the regular discovery and case management procedures, as Defendants are
16 proposing.

17
18 **A. Since Immunity and Act of State Doctrine Issues Are Not Relevant to This Case,
19 Soliciting a Statement of Interest From the Political Branches Would Be
20 Inappropriate**

21 Plaintiffs do not accept the Defendants’ underlying premise that solicitation of the
22 Government’s views is appropriate or necessary. Plaintiffs submit that a solicitation of the
23 Government’s views would amount to an unauthorized and uncalled for reliance on the political
24 process, that is antithetical to the principle of the rule of law and to the requirement that an
25 impartial, objective and non-political determination be made of the legal issues and claims that
26 have been presented, without reference to or reliance upon political considerations. Plaintiffs
27 believe that this approach would violate principles set out by Congress in the TVPA mandating
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1 that these types of issues and cases be adjudicated by the courts without giving deference to the
2 political and diplomatic processes.

3 The solicitation of a SOI would be inappropriate in this case given both the dual facts that
4 neither a foreign government nor foreign officials are defendants in this case, and that the U.S.
5 Government has very clearly and frequently taken the position that major human rights abuses are
6 taking place in China on a systemic basis that violates international law.

7
8 Since the Defendants in this case are not the Government of China, nor officials of that
9 Government, issues of immunity and the act of state doctrine are not relevant. Courts have
10 solicited a SOI from the U.S. Government when a lawsuit concerns the direct involvement of a
11 foreign government as a party to such a lawsuit. In *National Coalition Government of Union of*
12 *Burma v. Unocal, Inc*, for example, the court requested a SOI from the Government, reasoning
13 that, “a court presented with a foreign government’s lawsuit must consider whether the Executive
14 Branch has demonstrated its willingness to allow that government to assert its claims in the
15 United States court system.” *National Coalition Government of Union of Burma v. Unocal, Inc*,
16 176 F.R.D. 329, 339 (C.D.Cal. 1997); *see also Estados Unidos Mexicanos v. DeCoster*, 229 F.3d
17 332, 342 (1st Cir. 2000) (where one party to the lawsuit was a government entity, “[t]he district
18 court commendably invited comment from the U.S. Department of State”). Due in part to the
19 court’s deference to the government’s SOI, the case was dismissed as to the NCGUB. This result
20 can be explained by the fact that this portion of the *Unocal* case concerned a government-in-exile
21 (the NCGUB), “not...formally recognized by the United States,” and therefore involved questions
22 that would inevitably reflect on the U.S.’s treatment of another nation’s sovereignty. *Id.* at 340.
23 The district court in *Unocal* concluded that “permitting the NCGUB to sue in its capacity as the
24 purported government-in-exile of Burma would clearly require the court to ‘interfere in sensitive
25 matters of foreign policy,” yet still left the door open for individual plaintiffs to litigate against
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1 Unocal in subsequent lawsuits. *Id.* at 340 (citing *Pfizer, Inc. v. Government of India*, 434 U.S.
2 308, 319 (1978)).

3 Unlike the plaintiff in *Unocal*, however, no party in the instant case is an actual or purported
4 government entity or official, and thus no “sensitive matter of foreign policy” is directly
5 implicated. Although it may be appropriate for a court to solicit the U.S. Government’s statement
6 of interest when a lawsuit names a foreign government or a foreign official as a party, these are
7 not the circumstances of the instant case. Moreover, it is a well-established principle in cases
8 alleging torture that “the act of state doctrine should not be applied...because no state can claim
9 the right to engage in these practices” as a matter of government or government approved policy.
10 Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department*
11 *“Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Power*
12 *Concerns*, 37 Rutgers L.J. 807, 825 n.103 (2006); see also *In re Estate of Marcos Human Rights*
13 *Litig.*, 978 F.2d 493, 500 (9th Cir. 1992); *Siderman*, 965 F.2d at 717. Since acts of torture are not
14 considered to be legitimate state actions, they are not entitled to the protection of the act of state
15 doctrine and thus the act of state concerns that Defendant seeks to raise are not implicated in the
16 instant case.

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19 **B. Even if a Statement of Interest Were Submitted, It Would Not Be Dispositive with**
20 **Respect to Any Determinations of the Final Outcome of the Case**

21 Even if the Court should determine that obtaining a SOI is appropriate in order to clarify
22 the Government’s views on this case, it is well established that such a request is not necessarily
23 controlling with respect to any final determinations of justiciability. The *Sosa* court’s statement
24 that there is a “strong argument that federal courts should give serious weight to the Executive
25 Branch’s view of the case’s impact on foreign policy,” goes on to suggest that the deference given
26 by a court to the Executive has always varied on a case-by-case basis to be determined by the
27 court, based on a variety of factors that must be weighed and balanced. *Sosa*, 542 U.S. at 733.

1 The recent Ninth Circuit holding in *Alexis Holyweek Sarei v. Rio Tinto, PLC* illustrates this
2 principle. *Alexis Holyweek Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 2007 WL
3 1079901 (9th Cir. Apr. 12, 2007). There, the Court of Appeals for this Circuit held that “the SOI
4 submitted in this case, even when given serious weight, does not establish that any of the final
5 three *Baker* factors is ‘inextricable from the case,’” and therefore “we hold that none of the
6 plaintiffs' claims present nonjusticiable political questions.” *Id.* (citing *Baker*, 369 U.S. at 217).
7 Moreover, as the Court in *Rio Tinto* noted, “[t]he Supreme Court has been clear that ‘it is error to
8 suppose that every case or controversy which touches foreign relations lies beyond judicial
9 cognizance,’ and that the doctrine ‘is one of “political questions,” not of “political cases.”’” *Id.* at
10 *8 (quoting *Baker*, 369 U.S. at 211, 217). The Ninth Circuit then concluded that the plaintiffs’
11 claims in *Rio Tinto* did not present non-justiciable political questions because they “relate to a
12 foreign conflict in which the United States had little involvement (so far as the record
13 demonstrates), and therefore that merely ‘touch [upon] foreign relations.’” *Id.* at *8 (citing *Baker*,
14 369 U.S. at 211).

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17 Since all ATS cases by definition “touch foreign relations” in the sense that they relate to
18 actions taken by foreign governments abroad, this fact alone does not preclude litigating these
19 issues, and should not be used as a justification for “suspending” the case management process as
20 the Defendants request. To assert otherwise would defeat the very nature and purpose of the
21 TVPA statute, which Congress specifically designed to allow foreign nationals to seek relief for
22 abuses committed outside the United States where no remedy in their home country is available.
23 See 138 Cong. Rec. S. 2667, March 3, 1992. Although this case may indeed have political
24 overtones, Defendants wrongly assume that this fact automatically removes these issues from the
25 Court’s jurisdiction, which is not true.
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27 The legislative history recognizes that TVPA litigation may have some implications on
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1 foreign policy, but that the concerns for creating accountability for torture override. Congress
2 explained that one of the most enduring principles of U.S. foreign policy was a commitment to
3 individual human rights and the rule of law, and that the United States has sought to assume a
4 special responsibility in the world community to promote human rights and prevent or discourage
5 torture. 135 Cong. Rec. H. 6423, October 2, 1989. The purpose of the TVPA was to ensure that
6 courts assumed this role because “one of the ways in which the United States can promote and
7 enforce peremptory norms of international law is through enforcement of human rights in our
8 own domestic courts.” *Id.* At a Congressional hearing, Senator Grassley asked whether the
9 proposed Bill would improperly involve the judicial branch in foreign affairs. Senator Specter
10 replied that the proposed TVPA would not improperly involve the judicial branch in foreign
11 affairs, because “[t]orture is universally condemned by the family of nations. No nation officially
12 supports or condones torture. Therefore, I do not expect that this Act will entangle the judiciary
13 in sensitive foreign policy matters.” *Id.* Congressmen Broomfield explained during House
14 debate, “There are, of course, situations in which application of this statute could create
15 difficulties in our relations with friendly countries. But this is a small price to pay in order to see
16 that justice is done for the victims of torture.” 137 Cong. Rec. H. 11244, November 25, 1991.

19 Defendants’ assertion is also inconsistent with the great majority of case law, which
20 shows that cases touching on foreign relations can certainly be justiciable. The Defendants’
21 position is not an accurate reading of the controlling standard set out in *Baker* and *Sabbatino*, and
22 not consistent with substantial case law precedent. In fact, the Second Circuit noted that “judges
23 should not reflexively invoke the [political question doctrine and act of state doctrine] to avoid
24 difficult and somewhat sensitive decisions in the context of human rights.” *Kadic v. Karadzic*, 70
25 F.3d 232, 249 (2nd Cir. 1995) (holding that “[n]ot every case ‘touching foreign relations’ is
26 nonjusticiable” and that “[a]lthough these cases present issues that arise in a politically charged
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1 context, that does not transform them into cases involving nonjusticiable political questions”).

2 There is no doubt that this case has political and foreign policy overtones, that there are
3 individuals, businesses and even governments who have strong views on how this case might
4 impact future litigation and corporate practice. However, Congress and most U.S. courts have
5 moved away from the position that these cases should be decided with these political or foreign
6 policy concerns as the sole and controlling consideration. To the contrary, and consistent with
7 our legal system’s strong commitment to the rule of law, the prevailing trend has been to insulate
8 court cases from political influences, and to substantially reduce opportunities for the intrusion of
9 political and foreign policy considerations into the adjudicatory process, especially where the
10 legal standards to be applied are clear and expressly recognized. Therefore, the presence of these
11 potentially sensitive issues does not divest the court of jurisdiction, and certainly does not justify
12 “suspending” the regular court process pending solicitation and receipt of the U.S. Government’s
13 views.
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16 Plaintiffs dispute Defendants’ claim that the lawsuit “challenges three decades” of U.S.
17 foreign policy. Def. Mot. 3:24. The exact opposite is true. Consistently, for a number of years,
18 the U.S. Department of State Country Reports on Human Rights, and annual reports on
19 International Religions Freedom have placed China at or near the top of the list of the most
20 serious human rights violators. For example, the most recent Country Report on Human Rights
21 Practices in China, released March 6, 2007, notes that “the [Chinese] government’s human rights
22 record remained poor, and in certain areas deteriorated...[with] an increased number of high-
23 profile cases involving the monitoring, harassment, detention, arrest, and imprisonment of
24 journalists, writers, activists, and defense lawyers, many of whom were seeking to exercise their
25 rights under law,” citing the use of “torture and coerced confessions of prisoners” and “stricter
26 control and censorship of the Internet” as well. Country Reports on Human Rights Practices,
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1 (Mar. 6, 2007) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>.

2 In fact, the Report specifically references the parties in the present case and the subject
3 matter of this litigation in terms very critical of the Government of China. The Report states that
4 “citizens writing on the Internet were detained, arrested, and sentenced on state secrets and
5 subversion charges during the year” and specifically refers to the role played by the Defendants in
6 producing these results. *Id.* The Report makes specific reference by name to Plaintiff Shi Tao,
7 noting that “Yahoo provided information to security authorities, including access to private e-mail
8 accounts, used in the prosecution of journalist Shi Tao” and more importantly that “Yahoo’s
9 Chinese Web site issued a joint proposal calling for the Internet industry to...accept government
10 supervision.” *Id.* The U.S. Department of State has thus directly acknowledged the very abuses
11 for which Plaintiffs seek relief in this case, and has gone on record criticizing the Government of
12 China’s and the Defendants’ actions in this case in the clearest of terms. Defendants contend that
13 “reliance on generalized reports about abuses in China [] is inadmissible hearsay.” Def. Mot.
14 7:3. However, the very case Defendants cite to support this contention notes that “[t]he State
15 Department’s annual human rights reports have been held to fall within the public records
16 exception to the hearsay rule under *Fed. R. Evid. 803(8)*, and is thus admissible.” *Qi*, 349 F.
17 Supp.2d at 1310 n. 39. It is clear, therefore, that the U.S. Government has consistently and
18 frequently publicly condemned the very abuses for which Plaintiffs seek remedy. Delaying the
19 case management process to solicit the U.S. Government’s opinions on these grounds is therefore
20 without merit, particularly given the fact that the Department of State has itself officially
21 acknowledged the illegality of the abuse of one of the specific Plaintiffs in this case.

22 Moreover, the House Report on the TVPA suggest that far from interfering with foreign
23 policy, the maintenance of TVPA lawsuits of this type is in fact mandated by U.S. treaty
24 obligations. It points out that the Convention Against Torture essentially obligated State parties

1 to “adopt measures to ensure that [those committing these abuses] are held accountable for their
2 acts.” H.R. Rep. 103-367 *3.

3 It is true that a request for a SOI may also be considered necessary or appropriate where
4 agreements or declarations exist between two governments that purport to settle the very issues
5 that parties would seek to litigate. In *In re Nazi Era Cases Against German Defendants*
6 *Litigation*, for example, the plaintiff sought recovery from a German company for forced labor
7 during World War II. *In re Nazi*, 129 F. Supp.2d at 370. The court ruled that recovery was
8 precluded because the lawsuit challenged the validity of a diplomatic agreement addressing these
9 issues, and “since the United States has spoken to the validity of the Foundation [established by
10 the agreement] via its Statement of Interest” reiterating therein its support of the Foundation
11 through an Executive Agreement it had formed with Germany. *Id.* at 387. The district court
12 reasoned that “based on the weight of history” and in light of the SOI and Executive agreement it
13 was “clearly demonstrate[d] that the claims against German Industry presently before the Court
14 constitute political questions best left to the political branches.” *Id.* The defendants in the instant
15 case can point to no existing Executive Agreement, let alone a treaty, that would create a conflict
16 with an international agreement and bring the plaintiffs’ claims into the political question
17 category.
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21 **C. Because Determining the Justiciability of Claims Requires a Comprehensive Record**
22 **of the Pleadings and Facts, the Regular Discovery and Case Management Process**
23 **Should Not Be Delayed Pending Receipt of a Statement of Interest**

24 Defendants’ request for a bifurcated and premature case management schedule includes
25 the contention that before proceeding in this case, a SOI from the “political branches” of the
26 United States should be solicited by the Court. To support this contention, Defendant cites the
27 possibility of an outright dismissal based on the allegation that “plaintiffs’ case potentially
28 violates the ‘act of state’ doctrine, poses nonjusticiable ‘political questions,’ or should be

1 dismissed under the doctrine of ‘international comity.’” Def. Mot. 4:11-13. However, delaying
2 the regular case management schedule while awaiting such a submission falsely presupposes that
3 a SOI from the United States would be both appropriate and dispositive with respect to these
4 issues, when in fact there is no indication based on current case law to believe this to be true.

5
6 Whether a SOI would indeed be appropriate, and should affect the outcome of this case, is
7 a question for this court to review after receiving more adequate information about the
8 circumstances of the case, and whether these political views would be relevant pursuant to the
9 *Baker* and *Sabbatino* standards. In *Renee v. Geary*, the Supreme Court applied the *Baker* and
10 *Sabbatino* balancing tests in holding that “proper resolution of the justiciability issues presented
11 here requires examination of the pleadings and record to determine the nature of the dispute and
12 the interests of the parties in having it resolved in this judicial proceeding.” *Renee v. Geary*, 501
13 U.S.312, 316 (1991). See also *In re Nazi Era Cases Against German Defendants Litigation*, 129
14 F. Supp.2d 370, 375 (D.N.J. 2001) (relying on *Renee* to support the principle that “[t]o resolve a
15 justiciability issue, a Court should examine the pleadings and the record to determine the nature
16 of the underlying dispute and the interests of the parties in having the dispute resolved”). This
17 type of balancing cannot take place theoretically or in a vacuum, but must make use of the fact
18 development, the pleadings and the case management process is designed to produce. Without
19 this opportunity for factual and analytical development of these issues, or even the benefit of the
20 Defendants’ response to Plaintiffs’ complaint, this Court should not be put in the position of
21 making premature determinations of whether or not solicitation of a SOI is appropriate or
22 necessary. Under no circumstances is the suspension of the regular court process warranted
23 pending resolution of these questions.

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26 Suspending regular case management procedures pending solicitation and submission of a
27 SOI by the U.S. Government could cause significant and unnecessary delays in the litigation
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1 process. In the most recent ATCA/TVPA case litigated by the Plaintiffs' counsel where a
2 Statement of Interest from the U.S. Government was solicited, it took almost five months from
3 the time the request by the Court was made until the Government's views were submitted to the
4 Court. *Li Weixun v. Bo Xilai*, Case No. 1:04CV00649 (D.D.C.). That type of delay should not be
5 encouraged, especially where Plaintiffs remain in detention in China and are subject to great
6 personal risk, and where additional individuals are at risk of having personal information
7 disclosed by the Defendants in a similar way, potentially leading to their arbitrary arrest and
8 torture.

9
10 **V. Conclusion**

11 For the foregoing reasons, and given the inappropriateness of the Defendants' seeking a
12 second amendment to the Case Management schedule that was ordered by the Court on June 19,
13 Defendants' Motion should be denied in its entirety. Since the Defendants' Motion is without
14 merit, and a summary denial is justified, no Motions Hearing is necessary or appropriate.

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16 Respectfully submitted this 29th day of June, 2007,

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CERTIFICATE OF COMPLIANCE

This opposition on behalf of the Plaintiffs in the above captioned case complies with all Federal and Local Rule requirements, including the page limit of 25 pages for the narrative text set out in Rule 7-3(a). It is written in 12 point Times New Roman font and covers a total of 7,006 words and 21 pages.

Signed and Certified to this 29th day of June, 2007.

By: /s/ Morton Sklar
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