
FOREIGN SOVEREIGN IMMUNITIES ACT — EXHAUSTION OF LOCAL REMEDIES — NINTH CIRCUIT REQUIRES CASE-BY-CASE PRUDENTIAL ANALYSIS OF EXHAUSTION OF LOCAL REMEDIES IN FOREIGN SOVEREIGN IMMUNITIES ACT SUITS. — *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009).

Foreign sovereign immunity occupies an important place in the American legal terrain, implicating domestic law, international law, and international relations concerns. In the United States, the Foreign Sovereign Immunities Act of 1976¹ (FSIA) governs whether a foreign state is entitled to claim sovereign immunity.² The FSIA starts from a presumption of sovereign immunity, denying it *only* when a sovereign undertakes certain acts delineated by the statute.³ The FSIA is silent, though, on whether a plaintiff bringing suit against a foreign sovereign must exhaust the remedies available in the defendant sovereign’s judicial system before filing a claim in the United States. Recently, in *Cassirer v. Kingdom of Spain*,⁴ the Ninth Circuit held that lower courts should “consider exhaustion on a prudential, case-by-case basis” where international law or comity so requires.⁵ In dissent, Judge Ikuta provided strong arguments from the text and the legislative history for why the judiciary should not impose a prudential exhaustion analysis under the FSIA.⁶ The unwieldy test adopted by the Ninth Circuit is problematic for another reason: practical difficulties in applying the exhaustion analysis consistently will likely undermine Congress’s intent to provide a predictable legal scheme for assessing invocations of foreign sovereign immunity. The test’s equitable considerations include comity and other discretionary factors that are too nebulous to employ in a predictable manner. While all of the equitable factors stem from an Alien Tort Statute⁷ (ATS) case, two factors in particular may be difficult, or simply inapposite, to apply to FSIA suits. In addition to the reasons set forth in Judge Ikuta’s dissent, these practical problems in applying the test suggest that if an exhaustion analysis is attached to the FSIA, it should be Congress — and not the courts — that attaches it.

¹ Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.).

² See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433–34 (1989).

³ See 28 U.S.C. §§ 1604–1607 (2006).

⁴ 580 F.3d 1048 (9th Cir. 2009).

⁵ *Id.* at 1062.

⁶ *Id.* at 1064–71 (Ikuta, J., concurring in part and dissenting in part).

⁷ 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

In 1939, as the persecution of Jews in Nazi Germany was increasing, Lilly Cassirer attempted to leave the country.⁸ A government-appointed appraiser refused to let Cassirer leave Germany with a Camille Pissarro painting, *Rue Saint-Honoré, après-midi, effet de pluie*, that the Cassirer family had owned for over forty years. He instead forced her to sell it to him for \$360.⁹ Through various sales, the painting ultimately fell into the possession of the Thyssen-Bornemisza Collection Foundation, an organization with close ties to the Spanish government.¹⁰ In 2000, Claude Cassirer, the grandson and heir of Lilly Cassirer, learned of the painting's location and unsuccessfully petitioned a Spanish cultural minister to return it.¹¹ Cassirer then sued both the Foundation and Spain in the Central District of California in 2005, without attempting to litigate first in Spain.¹²

Spain and the Foundation moved to dismiss for lack of subject matter jurisdiction on the ground of sovereign immunity and for lack of personal jurisdiction.¹³ Cassirer argued that the FSIA allows subject matter jurisdiction over suits alleging that property was "taken in violation of international law" when that property is owned or operated by a state or a state instrumentality that is "engaged in a commercial activity in the United States."¹⁴ Judge Feess first found that the dispute presented a justiciable case or controversy and that the Foundation was an agency or instrumentality of Spain.¹⁵ The court noted that the FSIA uniquely confers personal jurisdiction over a foreign state if the requirements of subject matter jurisdiction are met and the defendant is properly served.¹⁶ The court concluded that there was sufficient evidence of the Foundation's commercial activity in the United States to support subject matter jurisdiction under the FSIA.¹⁷ The court also determined that there was no requirement that Cassirer exhaust judicial remedies in Spain because "the plain language of Section 1605(a)(3) . . . contains no exhaustion-of-foreign-remedies requirement."¹⁸ Furthermore, the FSIA explicitly required arbitration before

⁸ *Cassirer*, 580 F.3d at 1052.

⁹ *Id.*

¹⁰ *See id.* at 1051–53.

¹¹ *Id.* at 1053. The minister was also the chair of the Foundation's board. *Id.*

¹² *Id.*

¹³ *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1161–62 (C.D. Cal. 2006). Spain also moved for dismissal for failure to state a claim. *Id.* at 1162.

¹⁴ *Id.* (emphasis omitted) (quoting 28 U.S.C. § 1605(a)(3) (2006)).

¹⁵ *Id.* at 1162–64.

¹⁶ *See id.* at 1167.

¹⁷ *Id.* at 1170–76; *see also* 28 U.S.C. § 1605(a)(3).

¹⁸ *Cassirer*, 461 F. Supp. 2d at 1164. The court also chose not to give substantial weight to Justice Breyer's concurring opinion in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), in which Justice Breyer commented that there "may" be an exhaustion requirement, *id.* at 714

the exception to sovereign immunity for certain acts of violence perpetrated by terrorist states¹⁹ applied, suggesting that the absence of a similar exhaustion requirement in § 1605(a)(3) was the result of congressional intent.²⁰ The court concluded by certifying the matter for interlocutory appeal.²¹

The Ninth Circuit affirmed in part, reversed in part, and remanded.²² Writing for the panel, Judge Smith²³ dismissed the appeal on the issues of personal jurisdiction, standing, and the existence of a justiciable case or controversy, finding that there had been no final judgment on those issues.²⁴ He concluded that under the collateral order doctrine, the court did have jurisdiction over the issue of sovereign immunity, as immunity from suit would be lost if the case went to trial.²⁵ The court noted that the plain statutory language of the FSIA's expropriation exception was unambiguous and did not require the foreign state in the litigation to have taken the property illegally itself, and thus did not prevent Cassirer from suing Spain on this ground.²⁶ The court then observed that the FSIA enacted the "restrictive theory" of sovereign immunity, which removes immunity in "situations in which foreign states act more like private persons or are engaged in commercial activities."²⁷ The court upheld the determination of the trial court that the Foundation had engaged in commercial activity in the United States,²⁸ seemingly fulfilling the subject matter jurisdiction requirements of the FSIA.

However, the Ninth Circuit disapproved of the district court's failure to conduct a prudential exhaustion analysis. Judge Smith analyzed the statutory language and legislative history of the FSIA, finding complete congressional silence on the topic of exhaustion.²⁹ He then moved to the "context" of the FSIA, a solely jurisdictional statute "depend[ent] on the law of nations to define the substantive rights embo-

(Breyer, J., concurring), focusing instead upon the lack of such a requirement in the majority opinion. See *Cassirer*, 461 F. Supp. 2d at 1164.

¹⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 221(a), § 1605(a)(7), 110 Stat. 1214, 1241, *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, sec. 1083(b)(1)(a)(iii), 122 Stat. 3, 341.

²⁰ *Cassirer*, 461 F. Supp. 2d at 1164.

²¹ *Id.* at 1162.

²² *Cassirer*, 580 F.3d at 1064.

²³ Judge Nelson joined Judge Smith in the majority opinion.

²⁴ *Cassirer*, 580 F.3d at 1054.

²⁵ *Id.* at 1055.

²⁶ *Id.* at 1056. The court noted that the passive phrasing of "property taken in violation of international law" did not require courts to read a condition into the statute necessitating that the foreign state in the suit have taken the property. See *id.* (quoting 28 U.S.C. § 1605(a)(3) (2006)).

²⁷ *Id.* at 1057.

²⁸ *Id.* at 1058; see also *id.* at 1058–59 (noting some examples of the Foundation's commercial activities).

²⁹ *Id.* at 1060.

died in any cause of action³⁰ and thus akin to the ATS as interpreted by the Supreme Court in *Sosa v. Alvarez-Machain*.³¹ Because American courts “import well-settled principles of international law to define substantive rights in cases brought under the FSIA,” there were also sound reasons to introduce “well-settled limitations to such causes of action, including the doctrine of exhaustion of remedies.”³² In light of the statutory silence regarding exhaustion, the court concluded that categorically requiring exhaustion in FSIA cases would unduly restrict congressional and constitutional jurisdictional power through foreign sources of law.³³ “[W]here principles of international comity and rules of customary international law require exhaustion,” however, the majority concluded that courts should “exercise sound judicial discretion and consider exhaustion on a prudential, case-by-case basis.”³⁴ To determine whether to require exhaustion in a given case, the court imported the multifactor test from an ATS case, *Sarei v. Rio Tinto, PLC*.³⁵ This test states that if the defendant affirmatively pleads that the plaintiff has failed to exhaust local remedies, the court should consider whether Congress has “clearly required” exhaustion.³⁶ The court should then assess whether the defendant has demonstrated the availability of local remedies, which the plaintiff may rebut by establishing the futility of exhaustion.³⁷ Finally, the court may require or waive exhaustion at its discretion in light of several factors, including but not limited to:

(1) [T]he need to safeguard and respect the principles of international comity and sovereignty, (2) the existence or lack of a significant United States “nexus,” (3) the nature of the allegations and the gravity of the potential violations of international law, and (4) whether the allegations implicate matters of “universal concern”³⁸

Judge Ikuta concurred in part and dissented in part, disagreeing only with the majority’s exhaustion analysis.³⁹ She reasoned that Congress intended the FSIA to be a “comprehensive scheme” that

³⁰ *Id.*

³¹ 542 U.S. 692 (2004); see *Cassirer*, 580 F.3d at 1060.

³² *Cassirer*, 580 F.3d at 1061.

³³ See *id.* at 1061–62. The panel noted that “[t]o impose such a requirement would, in essence, usurp the Constitutional power vested in Congress and cede foreign lawmakers and jurists with power to limit the jurisdiction of United States federal courts.” *Id.* at 1062.

³⁴ *Id.* at 1062.

³⁵ 550 F.3d 822 (9th Cir. 2008) (en banc); see *id.* at 830–32.

³⁶ *Cassirer*, 580 F.3d at 1063. If Congress has not clearly required or rejected exhaustion, courts must “determine whether the applicable substantive law would require exhaustion.” *Id.*

³⁷ *Id.* The plaintiff may demonstrate futility “by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.” *Id.* (quoting *Sarei*, 550 F.3d at 832) (internal quotation marks omitted).

³⁸ *Id.* at 1063–64 (footnote omitted).

³⁹ *Id.* at 1064 (Ikuta, J., concurring in part and dissenting in part).

would “eliminat[e] inconsistency and uncertainty” in suits against foreign sovereigns⁴⁰ and would thereby resolve the discordance produced by courts’ deference to the executive branch’s politically contingent suggestions of sovereign immunity prior to the FSIA.⁴¹ Thus, if a sovereign’s act meets one of the exceptions delineated under the FSIA, the sovereign should be treated like any private litigant.⁴² Judge Ikuta concluded that the requirement to exhaust administrative remedies in certain federal suits was inapposite, as the underlying logic of such a requirement is premised upon separation of powers and other agency-based concerns.⁴³ Similarly, she argued that the reasoning of *Sarei* was not applicable in the FSIA context, as ATS claims include “potentially unlimited jurisdiction,”⁴⁴ whereas the FSIA, which both restricts plaintiffs to certain classes of suits and codifies the widely accepted restrictive theory of sovereign immunity, limits potential foreign affairs repercussions.⁴⁵

By borrowing *Sarei*’s four-pronged equitable analysis, the Ninth Circuit failed to expound a clear test that would give lower courts sufficient guidance to create uniform outcomes in FSIA suits. The test’s first equitable factor, comity, is amorphous, leading to different results in similar situations and allowing courts to assess foreign policy implications of FSIA suits despite congressional intent to the contrary. The test’s third and fourth equitable factors are primarily relevant for suits brought under the ATS, a statute that frequently implicates subject matter and policy concerns that are quite different from those raised by FSIA suits.⁴⁶ Finally, the court did not constrain the test’s factors to those that it enumerated, allowing courts to use whatever discretionary or equitable factors they deem appropriate. As a result of the significant discretion given to trial courts and the inclusion of potentially inapposite factors, the *Cassirer* test threatens to undermine the predictable, legal basis for assessing subject matter jurisdiction in claims against foreign sovereigns.

⁴⁰ *Id.*

⁴¹ *See id.* at 1064–65.

⁴² *Id.* at 1066.

⁴³ *See id.* at 1067–69.

⁴⁴ *Id.* at 1070.

⁴⁵ *See id.* at 1069–70.

⁴⁶ It should be noted that the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (to be codified as amended in scattered sections of 5, 10, 24, 28, 31, 37, 38, 41, 46, and 50 U.S.C.), allows for suits against foreign sovereigns that are designated state sponsors of terrorism for acts of “torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act,” if conducted by a state official. *Id.* § 1083, 122 Stat. at 338 (to be codified at 28 U.S.C. § 1605A). However, this exception is rather limited, as only four countries — Iran, Sudan, Syria, and Cuba — are designated state sponsors of terrorism as of January 2010. *See* United States Department of State, State Sponsors of Terrorism, <http://www.state.gov/s/ct/c14151.htm> (last visited Jan. 31, 2010).

Congress passed the FSIA in an attempt to codify “a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state”⁴⁷ after years of judicial deference to case-by-case executive branch determinations of foreign states’ sovereign immunity requests.⁴⁸ The unclear basis of the executive branch’s determinations resulted in “considerable uncertainty” for litigants, who always faced the risk that their disputes with foreign states would be “decided on the basis of nonlegal considerations.”⁴⁹ The FSIA’s statutory guidelines are intended to allow courts, instead of the executive branch, to make decisions regarding foreign sovereign immunity.⁵⁰ However, Congress cabined the power of the courts by delineating specific, tightly limited exceptions to the general principle of sovereign immunity,⁵¹ creating a predictable basis for determining jurisdiction.⁵² Allowing the judiciary to make FSIA determinations only within strict guidelines also lessened the need for courts to make foreign policy determinations when deciding sovereign immunity claims.⁵³

Cassirer has the potential to undermine these congressional purposes. The *Cassirer* test’s first equitable factor, “the need to safeguard and respect the principles of international comity and sovereignty,”⁵⁴ is likely to be applied inconsistently and to undercut the purpose of the FSIA by allowing courts to consider foreign affairs implications in FSIA suits. As numerous authors have observed, “[c]omity . . . is not a precise legal obligation that mandates particular outcomes for specific disputes.”⁵⁵ The Supreme Court’s difficulty in defining this concept in

⁴⁷ *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983).

⁴⁸ See *id.* at 486–88. Jack Tate, the Acting Legal Advisor to the Department of State, wrote a letter to the Justice Department in 1952 detailing the State Department’s decision to switch to the restrictive theory of sovereign immunity. This decision led to a combination of the restrictive theory and “political considerations” determining whether the executive branch suggested that a state be granted sovereign immunity. See *id.* at 487 & n.9.

⁴⁹ H.R. REP. NO. 94-1487, at 9 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6607. “Nonlegal” considerations included foreign policy implications, among other concerns. See HAZEL FOX, *THE LAW OF STATE IMMUNITY* 317 (2d ed. 2008) (noting that part of the goal in transferring the determination of sovereign immunity to the judicial branch was to “reduc[e] the foreign policy implications and provid[e] legal standards”).

⁵⁰ See Miguel Angel Gonzalez Felix, *The Foreign Sovereign Immunities Act: Fair Play for Foreign States and the Need for Some Procedural Improvements*, 8 HOUS. J. INT’L L. 1, 10 (1985).

⁵¹ See 28 U.S.C. §§ 1604–1607 (2006).

⁵² See *Cassirer*, 580 F.3d at 1066–67 (Ikuta, J., concurring in part and dissenting in part).

⁵³ See FOX, *supra* note 49, at 317.

⁵⁴ *Cassirer*, 580 F.3d at 1063.

⁵⁵ JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 6 (2d ed. 2003); see also Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 3 (1991) (“[T]he meaning of international comity remains uncertain.”).

the past⁵⁶ has resulted in a standard akin to Justice Stewart's definition of obscenity.⁵⁷ Accordingly, the ineffable nature of comity endangers the predictability that Congress intended the FSIA to provide.⁵⁸ Moreover, courts have used the broad, general definition of comity in the past to assess suits' repercussions on political and foreign affairs.⁵⁹ While the consideration of comity probably will not lead to political calculations by lower courts in all instances, it does open a backdoor through which to include them,⁶⁰ directly contravening the congressional intent of a nonpolitical test for FSIA suits.

The majority's reliance upon *Sarei*, a decision based on an ATS suit alleging "egregious violations of jus cogens norms,"⁶¹ introduces an even more troublesome influence upon the *Cassirer* test due to the different legal and factual contexts in which ATS and FSIA cases typically arise. In particular, human rights claims — the kind of suit presumably most likely to fulfill either the third or fourth discretionary factor's requirements — have fared poorly under the FSIA due to the existence of narrowly delineated exceptions, in contradistinction to the ATS's wide-reaching language.⁶² The third and fourth factors in the

⁵⁶ See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) ("[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("[Comity] is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests.");

⁵⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it . . .").

⁵⁸ See Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 894 (1998) (noting that the definition of comity "inevitably invites intuitive adjudication, and hence . . . *ex ante* unpredictability").

⁵⁹ See, e.g., *Yousuf v. Samantar*, 552 F.3d 371, 382 (4th Cir. 2009) ("[T]he purpose of foreign sovereign immunity . . . is to protect international relations between the United States and foreign sovereigns as a matter of comity."); *cert. granted*, 130 S. Ct. 49 (2009); *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) ("[T]he only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend 'amicable working relationships' with Egypt." (quoting *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005)); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) ("International comity serves as a guide to federal courts where 'the issues to be resolved are entangled in international relations.'" (quoting *In re Maxell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996))).

⁶⁰ See Paul, *supra* note 55, at 6–7 ("[C]ourts often use comity to relate different categories of law and policy, for example at the border of law and public policy, public and private law, domestic and international law, and law and international politics. . . . As a bridge, comity is meant to expand the role of public policy, public law, and international politics in domestic courts.");

⁶¹ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007), *remanded*, 550 F.3d 822 (9th Cir. 2008) (en banc).

⁶² See Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 510 (2008) ("Proponents have tried to fit the square peg of human rights claims into the round holes of the FSIA exceptions, but with very limited success."); see also Lucian C. Martinez, Jr., *Sovereign Immunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Cleri-*

majority's test may therefore require an awkward analysis of "the nature of the allegations and the gravity of the potential violations of international law" or "whether the allegations implicate matters of 'universal concern'"⁶³ for FSIA cases that are relatively run-of-the-mill litigation. The "universal concern" of the allegations or the "gravity of the potential violations of international law" may be part of a meaningful analysis for suits alleging "wanton killing and acts of cruelty, village burning, rape, and pillage,"⁶⁴ but it is not clear how to assess such factors when a plaintiff attempts to sue a foreign sovereign for actions based upon commercial activity⁶⁵ or maritime liens.⁶⁶ If anything, it would seem that FSIA cases are at an immediate *disadvantage* in gaining a domestic court forum compared to ATS human rights suits under the *Sarei* factors — despite Congress's expressly granting subject matter jurisdiction over the limited number of exceptions within the FSIA.

The ability of lower courts to use unenumerated factors further compounds the uncertain basis of judicial decisionmaking under the auspices of the *Cassirer* test. As Judge Smith noted, the list of four discretionary factors is nonexhaustive:⁶⁷ a court considering an FSIA suit should "examine the record before it, the applicable substantive law, and various equitable factors and then . . . carefully weigh whether to require exhaustion of local remedies on the claims before it."⁶⁸ The Ninth Circuit's largely unlimited test — including an undefined amalgamation of "equitable factors" — is the opposite of the precise, predictable, and uniform test contemplated within the categorical exceptions of the FSIA.

Although the Ninth Circuit's test is particularly cumbersome, *any* prudential exhaustion test is highly likely to introduce significant judicial discretion and unpredictability in practice — a result that the drafters of the FSIA expressly sought to avoid to benefit both foreign sovereigns and private litigants. Coupled with Judge Ikuta's convincing textual and purposive arguments for not reading an exhaustion analysis requirement into the text of the FSIA, these practical difficulties with any kind of prudential exhaustion analysis suggest that if such an exhaustion requirement is to be added to the FSIA, it should be done by Congress — not the courts.

cal Sexual Abuse Cases?, 44 TEX. INT'L L.J. 123, 131 (2008) ("The [ATS] has been the primary vehicle by which claims of human rights abuses committed abroad have been litigated in U.S. courts.").

⁶³ *Cassirer*, 580 F.3d at 1063–64.

⁶⁴ *Sarei*, 550 F.3d at 825.

⁶⁵ 28 U.S.C. § 1605(a)(2)–(3) (2006).

⁶⁶ *Id.* § 1605(b).

⁶⁷ The list "includ[es], but [is] not limited to," the enumerated factors. *Cassirer*, 580 F.3d at 1063.

⁶⁸ *Id.* at 1063 n.21.