THE "PRUDENTIAL EXHAUSTION" DOCTRINE IN TRANSNATIONAL LITIGATION IN U.S. COURTS

"As a moth is drawn to the light, so is a litigant drawn to the United States."[1] In 1983, when the British judge Lord Alfred Thompson Denning noted this in an opinion, he captured a growing sentiment in the late twentieth century that American courts had begun adjudicating the entire world's disputes. Be it personal injury plaintiffs drawn to the American legal system's higher damages awards,[2] or the increasingly extraterritorial reach of American laws,[3] American courts were faced with causes of action that implicated foreign parties, foreign evidence, and — often — foreign sovereigns too.

Some viewed this as a positive development.[4] However, several others decried this trend as the judiciary meddling in foreign affairs and perverting the text of statutes to achieve policy goals.[5] Foreign sovereigns objected as well, with even allies like Germany criticizing such American legal imperialism and "intrusion[s] into [their] sovereignty."[6]

To help U.S. courts avoid the growing rancor around such suits, the possibility of clogged dockets, or legislating from the bench, several legal paths exist to restrain their adjudicative or prescriptive jurisdiction.[7]

In other situations, courts can rely on prudential doctrines, canons of interpretation, or choice-of-law rules to withhold their jurisdiction.[8]

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[1] Smith Kline & French Lab'ys Ltd. v. Bloch [1983] 1 WLR 730 (AC) at 733 (Eng.).

[2] *See* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508–09 (2008) (listing benefits of suing in U.S. courts for foreign plaintiffs, such as "liberal pretrial discovery; . . . jury trials in civil litigation; higher damage awards, including punitive damages; . . . contingent fee arrangements with counsel; [and] the absence of 'loser pay' rules for the unsuccessful party").

[3] *See generally* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009) (cataloging the expansion in the reaches of American antitrust law, national security law, and securities regulations, among others).

[4] *See, e.g.*, Pierre N. Leval, Comment, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFFS., Mar./Apr. 2013, at 16, 16–17.

[5] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, Opinion, *Judicial Foreign Policy We Cannot Afford*, WASH. POST (Apr. 19, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702859.html [https://perma.cc/JL7U-RK8R]; José A. Cabranes, Essay, *Withholding Judgment: Why U.S. Courts Shouldn't Make Foreign Policy*, FOREIGN AFFS., Sept./Oct. 2015, at 125, 125–27.

[6] Brief of Amicus Curiae, Federal Republic of Germany in Support of Appellants' Position that the Hague Convention Should Be Used for Jurisdictional Discovery at 1, *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004) (No. 02-4272).

[7] A statute can explicitly limit the plaintiffs and defendants to whom it applies. For example, plaintiffs under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, cannot sue corporations. Mohamad v. Palestinian Auth., 566 U.S. 449, 451–52 (2012). Courts can also find that they lack personal jurisdiction over the defendant. The Supreme Court's narrowing of personal jurisdiction in recent years has helped courts in this regard. *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 431–35 (2017).

[8] *See, e.g.*, William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078–79, 2079 tbl.1 (2015) [hereinafter Dodge, *Comity*] (cataloging doctrines that American

Forum non conveniens allows judges to dismiss, discretionarily, cases they believe would be more appropriately adjudicated in another country's courts.[9] The presumption against extraterritoriality "serves to protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord,"[10] and it presumes that Congress "is primarily concerned with domestic conditions."[11] And the act of state doctrine requires that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid" without the usual review for consistency with the public policy of the forum.[12]

Exhaustion, also known as the "local remedies rule," is another such doctrine — requiring plaintiffs to exhaust their domestic remedies prior to bringing suit in a foreign setting. In the international context, this rule was applied to plaintiffs bringing suit in international tribunals and to states seeking to protect their nationals abroad.[13] By contrast, American federal courts, in two statutes devoted to transnational claims (the Alien Tort Statute[14] (ATS) and the Foreign Sovereign Immunities Act of 1976[15] (FSIA)), have *prudentially* required exhaustion of local remedies.[16]

This Note proceeds in five Parts. Part I introduces the original local remedies rule, the basis for the prudential exhaustion doctrine. Part II covers the usage of prudential exhaustion in ATS lawsuits. It describes the ATS, summarizes relevant case law, and argues that prudential exhaustion in ATS claims is understandable as an attempt by federal courts to procedurally flesh out a cause of action under the notoriously opaque statute. Part III introduces the FSIA and focuses on the statute's expropriation exception to immunity (where federal courts have most heavily debated the merits of prudential exhaustion). Part IV lays out a live circuit split between the Seventh and D.C. Circuits on whether

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courts turn to when a lawsuit implicates foreign affairs concerns); Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1084 (2015) (describing doctrines that "permit or require a court to dismiss a case because it is too 'foreign'"). *See generally* Gardner, *supra* note 7 (arguing that courts have restricted such litigation too much and should retire some discretionary doctrines).

9 Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007).

10 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 20–22 (1963)).

11 *Id.* (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)); *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."). For more on the presumption against extraterritoriality, see generally William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020).

12 W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990).

13 *See* CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 3–4, 203–04 (2d ed. 2004).

14 28 U.S.C. § 1350.

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

16 *See* Dodge, *Comity*, *supra* note 8, at 2110 & n.243. The concept of requiring local remediation before proceeding with a transnational claim in American federal courts is not solely prudential. For example, the TVPA explicitly requires prospective plaintiffs to first exhaust local remedies at the site of their alleged torture. 28 U.S.C. § 1350 note.

lawsuits under the FSIA's expropriation exception should require prudential exhaustion. The Supreme Court has granted review to address this question. Part V argues that within the FSIA's expropriation exception, prudential exhaustion is not required under international law, international comity, the statutory text, or separation of powers principles. A conclusion follows, suggesting an alternative for courts.

The Note's argument is about the FSIA, but analyzing the ATS is essential for three reasons. First, both statutes enable private parties to litigate common law claims in U.S. federal courts on a transnational basis. Second, the ATS jurisprudence on prudential exhaustion has been highly influential on federal courts adjudicating FSIA claims. Third, the reasons that prudential exhaustion may be acceptable in the ATS context also help explain why it is *not* warranted in the FSIA context.

I. THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW

The local remedies rule requires that a plaintiff, before the settlement of an international dispute, first exhaust local remedies unless they are futile or a sham.[17] Professor Chittharanjan Amerasinghe asserts that the acceptance of the rule's existence and validity in customary international law "needs no proof"[18] but that its scope is unclear.[19] Nevertheless, the rule has two uncontested applications in customary international law: first, when a state exercises diplomatic protection against another state on behalf of its nationals; and second, when any plaintiff brings a claim before an international tribunal.[20]

The rule originated in the context of that first application: diplomatic protection of aliens.[21] The Restatement (Third) of Foreign Relations Law (Restatement (Third)), referring to diplomatic protection, observes that "[u]nder international law, ordinarily a state is not required to consider a claim *by another state* for an injury to its national until that person has exhausted domestic remedies."[22] International tribunals and conventions have repeatedly upheld this application.[23]

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[17] *See* AMERASINGHE, *supra* note 13, at 3, 203–04.

[18] *Id.*

[19] *See id.* at 4.

[20] *See id.* at 3–13; *see also* Brief of Professor William S. Dodge as *Amicus Curiae* in Support of Plaintiffs-Appellants at 4, Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016) (No. 17-7146).

[21] *See* AMERASINGHE, *supra* note 13, at 3, 22–28. The State Department recognized the customary nature of this rule as early as the 1960s, when it evaluated claims of the nationalization and other taking of property belonging to U.S. nationals by the Cuban government. *See* Ernest L. Kerley, *U.S. Contemporary Practice Relating to International Law*, 56 AM. J. INT'L L. 165, 165–67 (1962). In an internal memorandum, the State Department stated it could not act through diplomatic channels upon its nationals' claims until they had exhausted or shown the futility of Cuban remedies. *See id.*

[22] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (AM. L. INST. 1987) (emphasis added).

[23] In the *Interhandel Case*, the International Court of Justice (ICJ) noted:

However, the second application of the rule, to proceedings before an international tribunal, is more common today. The International Court of Justice (ICJ) has emphasized that it is "well-established" in customary international law that "local remedies must be exhausted before *international proceedings* may be instituted."[24] In his public international law treatise, Professor James Crawford states that a "claim will not be admissible on the *international plane*" unless the individual plaintiff exhausts local remedies in the state "alleged to be the author of injury."[25]

In summation, the local remedies rule in customary international law originated for diplomatic protection of nationals abroad and has also become well established in proceedings before international tribunals. Amerasinghe notes with concern the expansion of the rule from its original context to new applications by the "solemn *fiat* of sovereign states,"[26] creating uncertainty over whether these new applications are custom.[27]

II. PRUDENTIAL EXHAUSTION AND THE ATS

The rise and fall of the Alien Tort Statute has been covered often and in depth.[28] The statute seems to have attained larger-than-life status.[29] This Part will briefly introduce the ATS, then recount the prudential exhaustion doctrine as used in ATS cases, and finally argue that adding a prudential exhaustion requirement to an ATS claim is understandable.

The ATS was enacted as part of the Judiciary Act of 1789[30] and states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law

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> [T]he [local remedies] rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 27 (Mar. 21). *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 26, Nov. 4, 1950, 213 U.N.T.S. 221, 238 ("The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law . . . ."); American Convention on Human Rights art. 46, Nov. 22, 1969, 1144 U.N.T.S. 123, 155.

[24] Switz. v. U.S., 1959 I.C.J. at 27 (emphasis added). Amerasinghe attributes this shift to the growing importance of "judicial and quasi-judicial" adjudications in international law, perhaps at the expense of diplomatic practice. AMERASINGHE, *supra* note 13, at 8.

[25] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 710–11 (8th ed. 2012) (emphasis added).

[26] AMERASINGHE, *supra* note 13, at 7.

[27] *Id.* at 7–8.

[28] *See generally, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011).

[29] *Cf.* Jack Goldsmith (@jacklgoldsmith), TWITTER (Apr. 24, 2018, 10:35 AM), https://twitter.com/jacklgoldsmith/status/988788536173387776 [https://perma.cc/2YHM-9V8B] ("ATS, RIP.").

[30] STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 1 (2018).

of nations or a treaty of the United States."[31] After enactment, the statute lay dormant for close to two centuries.[32]

In 1980, the Second Circuit revived the ATS in dramatic fashion. In *Filartiga v. Pena-Irala*,[33] Paraguayan plaintiffs sued a Paraguayan defendant for torturing their son to death in Paraguay.[34] The plaintiffs alleged wrongful death, among other claims.[35] After the Second Circuit opened the door, foreign victims of human rights abuses rushed to American federal courts as plaintiffs.[36] The ATS "garnered worldwide attention" and functioned as the "main engine for transnational human rights litigation in the United States" for more than two decades.[37] This trend continued until the Supreme Court intervened in 2004.

A. Prudential Exhaustion in the ATS Case Law

In 2004, the Supreme Court decided *Sosa v. Alvarez-Machain*.[38] In *Sosa*, a Mexican doctor sued a Mexican national (along with several U.S. parties) for his abduction and detention in Mexico — which had been effected to bring him to stand trial in the United States.[39] The Supreme Court reversed the Ninth Circuit's ruling affirming the district court's grant of summary judgment to the plaintiff,[40] leaving him without a federal remedy and holding that the ATS was solely a jurisdictional statute and did not create a federal cause of action.[41] ATS claims, the Court advised, must be limited to violations of those "customs and usages of civilized nations"[42] that are "specific, universal, and obligatory."[43]

Importantly for this Note's purposes, Justice Souter stated that the Court would "certainly consider . . . in an appropriate case" the possibility of requiring that "the claimant [exhaust] any remedies available

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31 28 U.S.C. § 1350.

32 Bellia & Clark, *supra* note 28, at 447.

33 630 F.2d 876 (2d Cir. 1980).

34 *Id.* at 878. Such lawsuits (with foreign plaintiff, defendant, and relevant conduct) were termed "foreign-cubed cases." *See, e.g.*, MULLIGAN, *supra* note 30, at 14 & n.132.

35 *Filartiga*, 630 F.2d at 878–79.

36 *See* MULLIGAN, *supra* note 30, at 6–7 (noting that the Second Circuit's *Filartiga* decision made the ATS "'skyrocket' into prominence").

37 Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013).

38 542 U.S. 692 (2004).

39 *Id.* at 697–98. The doctor sued the Mexican defendant under the ATS for violating the law of nations. *Id.* at 698.

40 *See id.* at 699.

41 *Id.* at 713.

42 *Id.* at 734 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

43 *Id.* at 732 (quoting *In re* Estate of Ferdinand Marcos, Hum. Rts. Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). The Court believed that for the First Congress, these violations likely tracked the three crimes against the law of nations recognized by Blackstone: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715.

in the domestic legal system."[44] In the same footnote, he approvingly cited the Torture Victim Protection Act of 1991's[45] (TVPA) exhaustion requirement.[46]

The next year, the Eleventh Circuit was tasked with deciding whether ATS claims were subject to an exhaustion requirement.[47] The plaintiffs were Haitians who were suing a Haitian army officer for an extrajudicial killing, torture, and arbitrary detention that allegedly took place in Haiti.[48] They brought claims under the TVPA and the ATS.[49] The panel recognized the TVPA's explicit exhaustion requirement but held that such a requirement did not apply to the ATS because "nothing" in the statute "limit[ed] its application" in such a way.[50]

In 2011, the Seventh Circuit also held that ATS claims did not require exhaustion.[51] The defendants in that case had argued for a mandatory exhaustion requirement rule in ATS suits.[52] Judge Posner rejected that argument and stated that the implications of such an argument "border[ed] on the ridiculous."[53] However, he concluded by asserting that a U.S. court *could*, "as a matter of international comity," give the foreign state's courts a chance to remedy the violation if the state were "willing and able."[54]

While referencing comity, Judge Posner cited the Ninth Circuit, the only circuit to have actually recognized a prudential exhaustion requirement for ATS cases.[55] In *Sarei v. Rio Tinto, PLC*,[56] current and former residents of Papua New Guinea sued a mining group for committing international law violations at its mine in the country, which allegedly led to a civil war and injured plaintiffs.[57] The *Sarei* court held that in ATS cases with a weak "nexus" to the United States, "courts should carefully consider the question of exhaustion, particularly . . . with respect to claims that do not involve matters of 'universal concern.'"[58]

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[44] *Id.* at 733 n.21.

[45] 28 U.S.C. § 1350 note.

[46] *Sosa*, 542 U.S. at 733 n.21 (citing 28 U.S.C. § 1350 note).

[47] *See* Jean v. Dorélien, 431 F.3d 776, 778 (11th Cir. 2005).

[48] *See id.* at 777–78. This case presented another "foreign-cubed" scenario.

[49] *Id.* at 777.

[50] *Id.* at 781 (quoting Jama v. INS, 22 F. Supp. 2d 353, 364 (D.N.J. 1998)).

[51] *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1024–25 (7th Cir. 2011).

[52] *Id.*

[53] *Id.* at 1025.

[54] *Id.*

[55] *See id.* (citing Sarei v. Rio Tinto, PLC, 550 F.3d 822, 831–32 (9th Cir. 2008) (en banc) (plurality opinion)).

[56] 550 F.3d 822.

[57] *See id.* at 824 (plurality opinion). This was not a foreign-cubed case because the named plaintiff was a lawful permanent resident of the United States at the time of the lawsuit. *Id.* at 831.

[58] *Id.* at 831.

The Ninth Circuit admitted that neither the ATS's text nor international law imposed an exhaustion requirement.[59] Judge McKeown's plurality opinion, controlling in this part, recognized that the local remedies rule was not absolute even in international law and emphasized that "United States courts are *not* international tribunals."[60] However, she wrote that prudential exhaustion was even more important in domestic tribunals.[61] While international tribunals establish their jurisdiction with consent from the sovereigns they would exercise power over, domestic tribunals such as U.S. federal courts do not have such consent backing them.[62] Therefore, "comity" reasons favored prudential exhaustion more heavily in domestic courts.[63]

B. Accepting Prudential Exhaustion in the ATS

The Supreme Court has not explicitly added a prudential exhaustion requirement to ATS claims but would be justified in doing so. The ATS is a notoriously opaque statute. Its present form is a thirty-three-word sentence that does not yield any clean interpretations.[64] It has been cosmetically amended by Congress only three times since its enactment, the latest modification coming more than seventy years ago, in 1948.[65] Comparing it to other domestic statutes does not help; it has been described as "unlike any other [provision] in American law."[66] Turning to international equivalents is also a lost cause; such a statute is "unknown to any other legal system in the world."[67]

Furthermore, there is little evidence of legislative intent to guide interpretation. Even though the statute has existed for over two centuries, "no one seems to know whence it came."[68] The debates about the Judiciary Act of 1789 contain "no reference" to the ATS, and "there is no direct evidence of what the First Congress intended it to accomplish."[69]

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59 *See id.* at 824, 830.

60 *Id.* at 830.

61 *Id.*

62 *Id.*

63 *Id.*

64 28 U.S.C. § 1350; *see, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004) ("[D]espite considerable scholarly attention, . . . a consensus understanding of what Congress intended has proven elusive.").

65 Act of June 25, 1948, 62 Stat. 869, 934 (codified at 28 U.S.C. § 1350).

66 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

67 *Id.*

68 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010). In 1975, when the ATS still lay dormant, Judge Friendly called it a "legal Lohengrin." *Id.*

69 *In re* Estate of Ferdinand E. Marcos Hum. Rts. Litig., 978 F.2d 493, 498 (9th Cir. 1992). One origin story claims it was enacted in response to the newly independent United States' embarrassing inability to punish those who had tortiously injured foreign diplomats. *See Sosa*, 542 U.S. at 715–18. However, at least one sitting Supreme Court Justice is skeptical of that account. *See* Jesner v.

This inscrutable provision, once revived by the Second Circuit, raised multiple issues. First, it caused friction with foreign sovereigns. In a few years, American federal judges were entertaining globetrotting lawsuits with *no* nexus to the United States — prompting pointed briefs, letters, and public statements by miffed states.[70]

Second, the legal theories behind such claims worried people from both tort and human rights law perspectives. Could an act of genocide be litigated as a wrongful death action? Or an act of state-sanctioned torture as an instance of battery? At least one scholar argued that pigeonholing law of nations violations into common law tort actions did not adequately address "the gravity and the seriousness" of such crimes and may instead "belittl[e]" their importance.[71]

Third, the ATS created doctrinal confusion in the federal courts. For much of American history, federal courts applied customary international law as general common law.[72] After the Supreme Court proscribed the creation of general common law by federal courts in *Erie Railroad Co. v. Tompkins*,[73] the status of customary international law in those courts was left unclear.[74] In order to revive the ATS consistently with *Erie*, the Second Circuit implied a federal cause of action, concluding that the claims grounded in customary international law arose not under general common law, as they had always been understood to do, but under federal law itself.[75] And with that federal cause of action came the federal courts' ability to shape that cause of action.

The Supreme Court announced its decision in *Sosa v. Alvarez-Machain* in this unique context. The *Sosa* Court explicitly allowed federal courts to craft a federal common law cause of action under the ATS,[76] provided they stayed within the boundaries of "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that the Court had recognized.[77] In the footnote discussed earlier, the *Sosa* Court stated that this

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Arab Bank, PLC, 138 S. Ct. 1386, 1417–18 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

[70] *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (cataloging the objections of the governments of Indonesia, South Africa, Canada, and Papua New Guinea to various lawsuits in American courts involving acts in their territories), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

[71] Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 41 (2013).

[72] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 827 (1997).

[73] 304 U.S. 64, 78 (1938).

[74] Bradley & Goldsmith, *supra* note 72, at 827.

[75] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Bradley & Goldsmith, *supra* note 72, at 833.

[76] Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

[77] *Id.* at 725.

"clear definition" requirement was "not meant to be" the *only* limiting principle and that an exhaustion requirement was possible.[78] In light of such guidance from the *Sosa* Court, it is understandable why the *Sarei* court, for example, felt it was within its ambit and justified in prudentially requiring exhaustion in ATS claims as a procedural matter.

In summation, while exhaustion is not required for an ATS claim by international law, the statutory text, or congressional intentions, it is understandable why federal courts would add such a procedural requirement. They have the authority and the Supreme Court's blessing to tailor the federal common law cause of action for such an opaque statute. Finally, requiring prudential exhaustion in ATS cases may not have much of an effect anymore due to the Supreme Court's *other* curbs upon the ATS.[79] Parts III and IV will explain why the FSIA is different.

III. THE FSIA AND ITS EXPROPRIATION EXCEPTION

The Foreign Sovereign Immunities Act of 1976 governs "all litigation" in American courts against foreign sovereigns, including their "agencies and instrumentalities,"[80] and provides the "sole basis for obtaining jurisdiction over a foreign state" in U.S. courts.[81]

The need for the FSIA arose primarily after the Second World War, when states and their agencies began playing a more prominent role in national and international trade.[82] These jurisdiction-immune state actors had an unfair advantage over private sector competitors.[83] To remedy this, the State Department in the infamous Tate Letter adopted the "restrictive theory of sovereign immunity," under which foreign states' immunity is recognized for sovereign acts but not for private ones.[84] This arrangement

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[78] *Id.* at 733 n.21; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 424 reporters' note 10 (AM. L. INST. 2018) (offering a similar justification for the prudential exhaustion doctrine in the ATS context).

[79] The Ninth Circuit ordered the lower court to conduct a prudential exhaustion inquiry in *Sarei* after the *Sosa* Court had limited the kinds of violations that could give rise to an ATS claim. *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 831–32 (9th Cir. 2008) (en banc) (plurality opinion). Since then, the Supreme Court has restrained the geographical reach of the ATS by requiring that the alleged conduct "touch and concern" the United States with "sufficient force to displace the presumption against extraterritorial[ity]." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013). In addition, the Court has held that the ATS cannot be used to sue foreign corporations. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018). An ATS lawsuit against a *domestic* corporation is still possible — but perhaps not for long. *See, e.g.*, Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018), *cert. granted*, No. 19-416, 2020 WL 3578678 (U.S. July 2, 2020).

[80] DAVID P. STEWART, FED. JUD. CTR., THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 1 (2d ed. 2018).

[81] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

[82] *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMPAR. L.Q. 302, 303 (1986).

[83] *See id.*

[84] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL. 984 (1952).

created a host of problems. As the political branches were responsible for making immunity determinations, such determinations would necessarily be ad hoc, contentious, and influenced by foreign pressure.[85]

The FSIA grants immunity to foreign sovereigns from American jurisdiction by default unless an exception applies.[86] The exceptions include, inter alia, noncommercial tortious injury in American territory, expropriation, and state-sponsored terrorism.[87] When a plaintiff files a claim under the FSIA, it is the plaintiff's burden to prove she is entitled to an FSIA exception. The expropriation context, governed by § 1605(a)(3), is no different. To establish subject matter jurisdiction under § 1605(a)(3), courts generally analyze four main elements: a plaintiff must prove that (1) rights in property are at issue, (2) the property was taken, (3) the taking violates international law, and (4) a commercial-activity nexus with the United States exists.[88] Different courts may group these elements in slightly different ways, but the constituent inquiries remain constant.[89]

This Note focuses on the expropriation exception for two reasons. First, prudential exhaustion cannot be applied equally across all exceptions because they are activated upon varying levels of connections with the United States. The expropriation exception presents the possibility of a taking occurring in another jurisdiction and the *proceeds* of that taking providing the requisite nexus to the United States. Thus, two discrete states can have facially legitimate claims to jurisdiction in an expropriation action, posing a tougher question for prudential exhaustion. Second, there is a *live* circuit split on prudential exhaustion in expropriation claims arising out of similar fact patterns. This presents a problem to solve and requires detailed judicial thinking on a similar situation to analyze.

IV. THE CIRCUIT SPLIT ON PRUDENTIAL EXHAUSTION IN THE FSIA'S EXPROPRIATION EXCEPTION

This Part contains two sections. First, it describes the Seventh Circuit's holding that prudential exhaustion is required in FSIA expropriation claims. Then, it describes how the D.C. Circuit disagreed and

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85 *See* Feldman, *supra* note 82, at 303–04.

86 *See* 28 U.S.C. § 1604.

87 *Id.* § 1605.

88 *See id.* § 1605(a)(3); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 671 (7th Cir. 2012) (citing Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000)). The fourth requirement, "commercial-activity nexus," may seem vague, but it is met by requirements typical in an FSIA claim: "(i) that the defendants possess the expropriated property or proceeds thereof; and (ii) that the defendants participate in some kind of commercial activity in the United States." Simon v. Republic of Hungary, 812 F.3d 127, 146 (D.C. Cir. 2016).

89 For example, the D.C. Circuit collapses the second and third elements and asks directly whether the property was "taken in violation of international law." Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83, 86 (D.C. Cir. 2005).

found that prudential exhaustion is *not* required. The Supreme Court has granted certiorari in two cases that raise this question.

Since the two Seventh Circuit cases and the leading D.C. Circuit case arose out of the same historical incident, some brief historical background is appropriate. When the Second World War started, Hungary joined the Axis Powers and carried out many of the Third Reich's policies.[90] The country's government began a "systematic campaign of discrimination" against its Jewish population.[91] In 1944, as the Allied nations inched closer to victory, Germany sent Nazi troops into Hungary; they commenced a "policy of total destruction" against the country's Jewish people.[92]

An integral part of this destruction was capturing the private property of Jewish people; government officials went from "home to home, inventorying and confiscating Jewish property."[93] Then, when forcibly transporting Hungarian Jews to Nazi death camps, Hungarian officials would confiscate "what little property" the people had on their person, like "suitcases, clothes, and hidden valuables."[94] Capturing Jewish people's property was not only essential to finance their ghettoization but also a *part* of their elimination.[95] By the war's end, more than five hundred thousand Hungarian Jews — two-thirds of the country's Jewish population — had died.[96] "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary."[97]

Nearly seventy years later, some Holocaust survivors who had emigrated and obtained different citizenships (including American) formed two sets of plaintiffs and sued Hungary and some state instrumentalities in the Seventh and D.C. Circuits. Judge Srinivasan recounted the atrocities from the Holocaust before asking a question facing both circuits: Are these "unspeakable and undeniable" crimes inflicted upon Hungarian Jews by the Hungarian government "actionable in United States courts"?[98]

A. The Seventh Circuit Approach

The Seventh Circuit has adjudicated two appeals over expropriation claims arising out of the Holocaust, and in both it dealt prominently with

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90 *See* de Csepel v. Republic of Hungary, 859 F.3d 1094, 1097–98 (D.C. Cir. 2017).

91 *Simon*, 812 F.3d at 133.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Cf. id.* at 133–34 (outlining the steps taken by the Hungarian government to achieve its goal of total destruction of Hungary's Jewish population).

96 *Id.* at 134.

97 *Id.* at 133 (quoting Class Action Complaint ¶ 1, Simon v. Republic of Hungary, 37 F. Supp. 3d 381 (D.D.C. 2014) (No. 10-cv-01770)). For more background, see generally Randolph L. Braham, *The Holocaust in Hungary: A Retrospective Analysis*, *in* THE NAZIS' LAST VICTIMS 27 (Randolph L. Braham & Scott Miller eds., 1998).

98 *Simon*, 812 F.3d at 132.

a prudential exhaustion requirement.[99] The plaintiffs in both lawsuits were Hungarian survivors of the Holocaust and heirs of other Holocaust victims.[100] They sought damages against the Hungarian national bank and national railway for expropriating property from Hungarian Jews.[101]

In *Fischer v. Magyar Államvasutak Zrt.*,[102] the Seventh Circuit stated that an exhaustion requirement can play one of two roles: as a substantive element of a violation or as a procedural requirement for a justiciable cause of action.[103] There are instances of state action where a plaintiff may not have *suffered* a taking unless she demonstrates the lack of adequate compensation from local remedies.[104] However, in this scenario, the circuit reaffirmed its *Abelesz v. Magyar Nemzeti Bank*[105] holding that the taking's genocidal nature meant that the plaintiffs had alleged violations of international law, and it thus treated an exhaustion requirement as a procedural limitation on "*where* plaintiffs may assert their international law claims."[106]

Earlier, in *Abelesz*, the Seventh Circuit had agreed that any prudential exhaustion requirement could not be based on the statute's text.[107] The panel could find "no language in the FSIA" and "no case law" indicating that the expropriation exception statutorily required exhaustion.[108] Furthermore, the panel noted that the FSIA once contained an exception with an explicit "local exhaustion requirement."[109] But that exception had been repealed at the time of the appeal, and the panel drew no conclusions from its existence or rollback while holding that the FSIA does not statutorily require exhaustion.[110]

In both appeals, the Seventh Circuit was imprecise with its usage of international law versus international comity, mixing the two. It asserted that the "exhaustion principle, based on comity, is a

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99 *See* Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 856–66 (7th Cir. 2015); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 678–85 (7th Cir. 2012).

100 *Fischer*, 777 F.3d at 852; *Abelesz*, 692 F.3d at 665.

101 *Fischer*, 777 F.3d at 852; *Abelesz*, 692 F.3d at 665–66. The *Abelesz* plaintiffs asserted causes of action such as genocide, aiding and abetting genocide, bailment, conversion, fraudulent misrepresentation, constructive trust, and accounting. *Abelesz*, 692 F.3d at 666. The *Fischer* plaintiffs also sued several private banks. *Fischer*, 777 F.3d at 852.

102 777 F.3d 847.

103 *Id.* at 857.

104 *See id.*

105 692 F.3d 661.

106 *Fischer*, 777 F.3d at 857 (emphasis added). The panel also noted that other circuits had considered such a prudential requirement and had decided not to impose it while not "foreclos[ing] the possibility." *Id.* at 859 n.2 (citing Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1036–37 (9th Cir. 2010); Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 934, 949 (D.C. Cir. 2008)).

107 *See Abelesz*, 692 F.3d at 678.

108 *Id.*

109 *Id.* at 678 n.8.

110 *Id.* at 678 & n.8.

well-established rule of customary international law."[111] Moreover, it stated that the defendants, in asking for an exhaustion requirement, were not arguing for an FSIA implicit defense but "invok[ing] the *customary rule itself*: the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity."[112] As support for its claim that the exhaustion requirement was based on international law, the panel cited the Restatement (Third), stating that "international law typically requires exhaustion of domestic remedies before [a] takings claim can be heard in a *foreign court*."[113]

In *Fischer*, the Seventh Circuit inextricably entwined international law and comity. The panel stated that international comity, which was "at the heart of international law,"[114] required that Hungarian courts be given the "first opportunity to hear" the plaintiffs' claims rather than have American courts "assume the worst about them."[115] However, the *Fischer* panel also informed the plaintiffs that this was not the end of the road.[116] The panel dismissed their claims without prejudice and assured them that "the doors of United States courts are closed to [them] for now" but are not "locked forever."[117] If the plaintiffs attempted to bring suit in Hungary and were blocked "arbitrarily or unreasonably,"[118] then American courts could "once again be open" to their claims.[119]

B. The D.C. Circuit Approach

The D.C. Circuit has also considered imposing a prudential exhaustion requirement in FSIA expropriation claims in two recent cases. One case, *Simon v. Republic of Hungary*,[120] arose out of the Holocaust experiences of Hungarian Jewish people (as had the Seventh Circuit's cases).[121]

The other case, *Philipp v. Federal Republic of Germany*,[122] was similarly related to the Third Reich's expropriation of Jewish people's property as an integral part of their eventual genocide. The *Philipp* plaintiffs were the heirs of several Jewish art dealers.[123] The plaintiffs' ancestors

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111 *Fischer*, 777 F.3d at 854; *see also Abelesz*, 692 F.3d at 679.

112 *Fischer*, 777 F.3d at 859 (emphasis added).

113 *Id.* at 858 (emphasis added) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (AM. L. INST. 1987)). This Note has previously explained how the cited Restatement provision refers to the particular context of state-on-state actions for diplomatic protection. *See supra* note 22 and accompanying text.

114 *Fischer*, 777 F.3d at 858 (discussing holding in *Abelesz*).

115 *Id.* at 860.

116 *Id.* at 852.

117 *Id.*

118 *Id.* at 865.

119 *Id.* at 866.

120 812 F.3d 127 (D.C. Cir. 2016).

121 *Id.* at 132.

122 894 F.3d 406 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

123 *Id.* at 409.

pooled resources to purchase a collection of medieval art.[124] They alleged that the Nazi regime arranged to buy them at an unfair price as a gift for Adolf Hitler.[125] The plaintiffs sued Germany and the German cultural agency that currently holds the collection.[126]

The D.C. Circuit ruled against the sovereign state in both cases on the matter of mandating that the plaintiffs exhaust local remedies.[127] Both sovereigns filed certiorari petitions against their respective adverse judgments, and the Supreme Court has granted review.[128]

The D.C. Circuit, in an earlier lawsuit filed under the FSIA's expropriation exception, had already held that the FSIA does not impose any statutory exhaustion requirement, and these panels followed the holding.[129] Like the Seventh Circuit, the D.C. Circuit in that earlier case had also brought up the then-repealed exception in the FSIA that explicitly contained an exhaustion requirement.[130] The panel maintained that the deletion of that exception for some "independent reasons"[131] did not weaken the conventional notion that "Congress's inclusion of a provision in one section *strengthens* the inference that its omission from a closely related section must have been intentional."[132]

In that case, the D.C. Circuit had also rejected an international law argument for prudential exhaustion. The defendant sovereign had cited the same Restatement (Third) provision regarding exhaustion of remedies that had worked with the Seventh Circuit.[133] But the D.C. Circuit did not bite. The panel easily distinguished the provision since it "addresse[d] claims of one state against another," not those claims that placed an individual of one state against another state in a court that de facto "cannot be in *both* the interested states."[134]

In *Simon* itself, Hungary argued that the plaintiffs would have to demonstrate that they exhausted domestic remedies in that state to show

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124 *Id.*

125 *Id.*

126 *Id.* at 408–09.

127 *See id.* at 414–16; Simon v. Republic of Hungary, 812 F.3d 127, 151 (D.C. Cir. 2016). The *Simon* court left it to the district court to consider such a claim, if asserted by the defendants, on remand. *Id.*

128 *See* Federal Republic of Germany v. Philipp, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020); Republic of Hungary v. Simon, No. 18-1447, 2020 WL 3578676 (U.S. July 2, 2020).

129 *See* Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 934, 948–49 (D.C. Cir. 2008).

130 *Id.* at 948 (discussing 28 U.S.C. § 1605(a)(7), the repealed state terrorism sponsor exception).

131 *Id.* at 949.

132 *Id.* at 948–49 (emphasis added) (citing Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 823 F.2d 608, 618 (D.C. Cir. 1987)).

133 *See id.* at 949. The provision states that "[u]nder international law, ordinarily *a state* is not required to consider *a claim by another state* for an injury to its national until that person has exhausted domestic remedies." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (AM. L. INST. 1987) (emphasis added).

134 *Chabad*, 528 F.3d at 949.

that there *was* a taking violative of international law.[135] The panel found this argument more credible but dismissed it because of the genocidal nature of the taking.[136] The panel agreed that in a standard expropriation claim, the violation may not ripen until a plaintiff has been *denied* just compensation.[137] In *Simon*, however, the panel held that the taking was *part* of the genocide and that the international law violation occurred at the moment of confiscation: when the plaintiffs' ancestors' property was taken simply because they were Jewish.[138] The panel held that the standard takings requirement of whether a victim "subsequently attempts to obtain relief through the violating sovereign's domestic laws" was not necessary here to find an expropriation.[139]

The D.C. Circuit, in *Philipp*, faced the question of applying prudential exhaustion to an FSIA expropriation claim *solely* out of international comity reasons.[140] In this lawsuit, Germany asked that the plaintiffs be made to exhaust local remedies first because to hold otherwise would "undermine [Germany's] 'dignity [as] a foreign state.'"[141] It insisted that as a "staunch U.S. ally," it "deserve[d] the chance to address" the plaintiffs' attacks in its own courts.[142]

The D.C. Circuit dismissed Germany's request and answered its international comity argument with a different comity argument: that between private and public actors.[143] The panel turned to the FSIA's text, specifically a provision that states foreign sovereigns subject to jurisdiction through an exception will have only those defenses that are "equally available to 'private individual[s].'"[144] The panel determined that since a private individual could never invoke a "*sovereign's* right to resolve disputes against it," such a defense was not available under the FSIA.[145] The panel clarified that the FSIA was a "'comprehensive' statement of foreign sovereign immunity" that *already* reflected Congress's preferred balance of international comity with justiciability, and it was not going to graft policy-driven alterations on the statute.[146] Thus, the *Philipp* panel held that the plaintiffs did not have to exhaust remedies in Germany, and it let the lawsuit proceed.

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135 Simon v. Republic of Hungary, 812 F.3d 127, 148 (D.C. Cir. 2016).

136 *Id.* at 149.

137 *Id.* at 148.

138 *Id.* at 149.

139 *Id.*

140 Philipp v. Federal Republic of Germany, 894 F.3d 406, 414–16 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

141 *Id.* at 415 (second alteration in original) (quoting Brief for Appellants at 68, *Philipp*, 894 F.3d 406 (No. 17-7064)).

142 *Id.* at 416 (quoting Brief for Appellants, *supra* note 141, at 77).

143 *Id.* at 415–16.

144 *Id.* at 416 (alteration in original) (quoting 28 U.S.C. § 1606).

145 *Id.* (quoting Brief for Appellants, *supra* note 141, at 68 (emphasis added)).

146 *Id.* (quoting Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014)).

The D.C. Circuit opinions were in direct conflict with those of the Seventh Circuit — a conflict explicitly acknowledged in *Philipp*.[147] However, as the next Part will explain, the D.C. Circuit was correct in its decision to not apply prudential exhaustion to the FSIA.

V. PRUDENTIAL EXHAUSTION IS NOT REQUIRED UNDER THE FSIA'S EXPROPRIATION EXCEPTION

A. An International Law Argument

As Part I made clear, only two applications of prudential exhaustion have attained the status of customary international law: the diplomatic protection of aliens and the institution of proceedings before an international tribunal.[148] Beyond those two specific domains, it is simply untrue that requiring prudential exhaustion is custom.[149] International law says nothing about proceedings in another country's domestic courts. Arguably, it *cannot* say anything about the matter because, as the Restatement (Fourth) of Foreign Relations Law states, "[a]ccess to domestic courts is governed by the domestic law of the forum."[150]

The Seventh Circuit cited the ICJ and the Restatement (Third), but it extrapolated their statements to proceedings instituted by *private* plaintiffs in the *domestic* courts of other countries. Each of those italicized words drives the "international law" foundations of the court's rulings further away from custom. The Seventh Circuit asserted that "customary international law may impose an exhaustion requirement" such that "plaintiffs would need to demonstrate that they exhausted remedies" in Hungary even if they just wanted to bring claims "outside" it.[151] This conclusion is wrong because the customary exhaustion requirement does not sweep so broad as to cover *any court* outside the offending nation. It is limited to *international tribunals* outside that nation.

The Seventh Circuit committed a similar sleight of hand when turning to the Restatement (Third) for support. It stated that, according to comment f of section 713, "international law typically requires exhaustion of domestic remedies before any [expropriation] claim can be heard in a *foreign court*."[152] But the Seventh Circuit misinterpreted the context

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147 *See id.*

148 *See generally* AMERASINGHE, *supra* note 13, at 3–13.

149 *See id.* The ICJ recognized this and in its opinion referred explicitly to "international proceedings" and a "State adopt[ing] the cause of its national" against another state. Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 27 (Mar. 21).

150 Brief of Professor William S. Dodge, *supra* note 20, at 4 (emphasis omitted); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 424 reporters' note 10 (AM. L. INST. 2018) ("In the absence of a treaty, the relationship among domestic courts is governed by rules of domestic law, like *forum non conveniens* and *lis pendens*.").

151 Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 857 (7th Cir. 2015).

152 *Id.* at 858 (emphasis added).

of the Restatement provision, which was referring to state-on-state actions and *not* private actions. The D.C. Circuit caught these interpretive errors by the Seventh Circuit and used them to justify its circuit split,[153] going so far as to suggest it would not change its law on the basis of a "*misapplied*, non-binding international legal concept."[154]

In summation, the Seventh Circuit's stance on a prudential exhaustion doctrine was based on a misapplication of customary international law and does not hold up to scrutiny.

B. An International Comity Argument

In its opinions, the Seventh Circuit seemed to mix international law and comity together. The two are often viewed as deeply intertwined,[155] but they are distinct. Comity has been called a "vague"[156] and "misleading"[157] term. Attempting to clarify this confusion, Professor William Dodge has defined comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law."[158] Since comity is *not* governed by international law, the Seventh Circuit's mixing of the two terms may have problematic consequences.

The Seventh Circuit approvingly cited custom about local exhaustion before an international tribunal proceeding. But the rule only makes sense because of the lack of res judicata in the international context. In other words, the local remedies rule in international law works because "an international tribunal is not bound to follow the result of a national court."[159] Therefore, when a private plaintiff satisfies the local remedies rule before commencing proceedings in a foreign tribunal, she can rest assured that she will get her day in national courts and her claim will be heard afresh.

However, American courts treat the merits decisions of foreign courts as binding for res judicata purposes.[160] Under the Uniform Foreign-Country Money Judgments Recognition Act, a foreign judgment entitled to recognition is "conclusive between the parties to the same extent as

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153 *See* Philipp v. Federal Republic of Germany, 894 F.3d 406, 416 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

154 *Id.* (emphasis added) (quoting Agudas Chasidei Chabad of U.S. v. Russian Federation, 466 F. Supp. 2d 6, 21 (D.D.C. 2006)).

155 *See* Dodge, *Comity*, *supra* note 8, at 2121–22 (noting examples such as sovereign immunity where international law and comity overlap).

156 Turner Ent. Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994).

157 Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201 (N.Y. 1918).

158 Dodge, *Comity*, *supra* note 8, at 2078 (emphasis omitted).

159 Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award, ¶ 177 (Nov. 20, 1984), 1 ICSID Rep. 413 (1993); *accord* CRAWFORD, *supra* note 25, at 59 (explaining that "there is no effect of *res [j]udicata* from the decision of a national court so far as an international jurisdiction is concerned").

160 *See* de Csepel v. Republic of Hungary, 714 F.3d 591, 606 (D.C. Cir. 2013) (noting that a claim's merits should not "be tried afresh" in this country after the foreign judgment (quoting Hilton v. Guyot, 159 U.S. 113, 203 (1895))).

the judgment of a sister state entitled to full faith and credit."[161] "The grounds for non-recognition under the Act are narrow and do not permit review of the merits."[162] Both Illinois and the District of Columbia, along with the majority of U.S. states, have adopted this Act.[163] The Seventh Circuit promised plaintiffs that the "doors of United States courts" were not closed to them "forever" and that they could come back if exhaustion of foreign remedies was "frustrated unreasonably or arbitrarily,"[164] but the circuit may not be able to fulfill that promise. A prudential exhaustion requirement in such expropriation lawsuits does not work merely as a deferral to let a foreign court have its say first. Instead, it is tantamount to a decision that the fate of the plaintiff's claims be decided entirely by another legal system and that they lose their access to adjudication under American law.

Moreover, deferring too heavily to the foreign sovereign out of international comity conflicts with another purpose of the FSIA: ensuring parity between foreign sovereigns and analogous private actors. Germany's "dignity" arguments in *Philipp* make for a good example. To recap, Germany asked the D.C. Circuit to require exhaustion of the plaintiffs because of international comity.[165] This request is facially sensible: preventing foreign sovereigns from being dragged through litigation is a commonly accepted goal of the FSIA. But the D.C. Circuit panel (correctly) followed the Supreme Court's guidance in *Republic of Argentina v. NML Capital, Ltd.*[166] and realized that *other* motivations drove the FSIA's enactment as well.[167] According to one of the FSIA's drafters, the statute was also enacted to codify the restrictive theory of sovereign immunity and ensure that foreign states did not enjoy an unfair advantage compared to their private competitors as they engaged in more commercial acts in a market economy.[168] Hence, the FSIA permits foreign sovereigns only those defenses that private parties can *also* raise.[169] And since a private actor could not argue for a right to hear disputes in its own courts as a "staunch U.S. ally" the way Germany did, Germany's prudential exhaustion argument could not prevail.

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[161] UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 7(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2005).

[162] Brief of Professor William S. Dodge, *supra* note 20, at 16.

[163] *See, e.g.*, D.C. Code §§ 15-361 to -371 (2020); *see also Foreign-Country Money Judgments Recognition Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=ae28oc30-094a-4d8f-b722-8dcd614a8f3e [https://perma.cc/VDG7-STT3] (tracking the states and territories that have adopted the Act).

[164] Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 852 (7th Cir. 2015).

[165] *See* Philipp v. Federal Republic of Germany, 894 F.3d 406, 414–16 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

[166] 573 U.S. 134 (2014).

[167] *See Philipp*, 894 F.3d at 415–16.

[168] *See* Feldman, *supra* note 82, at 303–05.

[169] 28 U.S.C. § 1606.

C. A Statutory Text Argument

The Seventh Circuit did not go far enough when noting that the FSIA does not require statutory exhaustion in expropriation claims. In fact, the FSIA may *forbid* it. Indeed, several arguments that justified giving federal courts leeway with interpreting the Alien Tort Statute cut against giving them such leeway with the FSIA. In the ATS, imposing an exhaustion requirement is not an interpretation of the statute but of the cause of action, over which the federal court has common law–making authority. The FSIA, however, is a more recent, detailed, and frequently amended statute — with far more accessible legislative intent and potential for a dialogue with Congress. Germany's request for an en banc rehearing of *Philipp* at the D.C. Circuit was denied, with a dissent by Judge Katsas.[170] In his dissent, Judge Katsas repeatedly compared the FSIA to the ATS, but the comparison is inapt.[171]

When the Seventh Circuit was faced with its second prudential exhaustion appeal, the Supreme Court had already decided *NML*. In that case, Argentina claimed immunity from postjudgment discovery of its extraterritorial property assets as a matter of international comity.[172] The Supreme Court emphatically dismissed that defense since the statute's plain text did not provide for it.[173] The *NML* Court stated that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] text. Or it must fall."[174] This textual specificity and confidence in the FSIA's framework was never possible with the ATS.

The FSIA arguably forbids a statutory exhaustion requirement for expropriation claims. It does not contain an explicit exhaustion requirement for those claims. More importantly, it *does* contain such a requirement for claims under the state terrorism exception.[175] A plaintiff bringing a claim against a state deemed a "sponsor of terrorism"[176] by the United States must first "afford[] the foreign state a reasonable opportunity to arbitrate the claim."[177] A primer on the FSIA for judges states that "the arbitration provision operates as a type of 'exhaustion of remedies' requirement, giving the foreign state an arbitration alternative to litigation in U.S. courts."[178] While the ATS has been described as "unlike any other [provision] in American law,"[179] there are multiple

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170 Philipp v. Federal Republic of Germany, 925 F.3d 1349, 1349 (D.C. Cir. 2019) (per curiam).
171 *See id.* at 1355–57 (Katsas, J., dissenting from the denial of rehearing en banc).
172 *See* Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 138–40 (2014).
173 *See id.* at 142–46.
174 *Id.* at 141–42.
175 28 U.S.C. § 1605A(a)(2)(A)(iii).
176 *Id.* § 1605A(a)(2)(A)(i)(I).
177 *Id.* § 1605A(a)(2)(A)(iii).
178 STEWART, *supra* note 80, at 122.
179 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

analogues to the FSIA's expropriation exception in the *same* statutory provision. Thus, it was interpretively unhelpful for the Seventh Circuit to rely on the footnote from *Sosa* about "consider[ing]" exhaustion as a further "limitation" in an "appropriate case."[180] *Sosa* was motivated by the peculiar bog of the ATS jurisprudence; it cannot be extrapolated to the FSIA.

Congress has frequently amended the FSIA since its enactment; if it wanted to incorporate an exhaustion requirement into expropriation claims, it would have done so.[181] Not only has Congress amended the FSIA numerous times,[182] but it has also amended the expropriation exception *itself*.[183] Contrast that with the two cosmetic amendments to the ATS in more than two centuries,[184] and it becomes clearer that courts already have a suitable partner in Congress to help guide them in interpreting the FSIA.

D. A Separation of Powers Argument

When it comes to controversial foreign relations issues, the dominant rhetoric in the last few decades has been about judicial activists getting involved more than Congress wanted them to. Scholars[185] and jurists[186] have warned about the dangers of the judiciary exceeding its proper role in our constitutional system and praised the primacy of the political branches in such foreign affairs inquiries. But if Congress has "authority over foreign commerce and foreign relations," it also has the "undisputed power" to determine "whether and under what circumstances foreign nations" should be brought to United States courts.[187] The Supreme Court has repeatedly emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" by Congress.[188]

With the FSIA, the judiciary-in-foreign-affairs problem risks running in the other direction. When federal courts impose a judge-made doctrine such as prudential exhaustion on FSIA expropriation claims,

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180 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

181 The Supreme Court has used this type of "Congress knows how to say . . ." argument to construe the FSIA narrowly before. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003).

182 Françoise N. Djoukeng, Note, *Genocidal Takings and the FSIA: Jurisdictional Limitations*, 106 GEO. L.J. 1883, 1912–13 (2018).

183 28 U.S.C. § 1605. Four years ago, Congress minimized the legal risk to foreign states when lending cultural works of art to the United States and its institutions by expanding their immunity. *See* Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act [https://perma.cc/V7BX-A5T6].

184 *See* 28 U.S.C. § 1350.

185 *See, e.g.*, Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1395–97 (1999) (noting that courts are ill equipped for inquiries into sensitive foreign affairs relations).

186 *See, e.g.*, Cabranes, *supra* note 5, at 125–26.

187 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983).

188 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013).

they *shrink* their own dockets even though Congress has made it clear that it *wants* them to exercise their jurisdiction in such cases. Unelected judges with little experience in foreign affairs should not be calculating for themselves what impact their prudential restraint may have. In the FSIA, Congress has given the judiciary enough information on when to respect a foreign sovereign's actions with immunity, when it would be wiser to let the other state resolve the issue under its system first (for an allegation as grave as terrorism), and when the judiciary's "virtually unflagging" obligations take priority. Courts do not need to engage in extratextual balancing acts regarding foreign interests: the FSIA as enacted *already represents* Congress's "comprehensive set of legal standards governing claims of immunity"[189] and accounts for "grace and comity."[190]

Moreover, by imposing a prudential exhaustion requirement in some cases, courts would risk a return to the chaotic pre-FSIA universe. Remember that for more than two decades, after the Tate Letter and before the FSIA's enactment, the immunity of each sovereign was determined in an individualized manner and was subject to foreign pressure and controversies. The FSIA was enacted partly to *avoid* that chaos and depoliticize immunity determinations. A prudential exhaustion requirement or an international comity abstention in *some* cases could once again politicize this issue if different sovereigns were treated differently.

CONCLUSION

Skeptics might worry that this Note's arguments will form a slippery slope. Without prudential limitations such as an exhaustion requirement, U.S. federal courts could soon be adjudicating the world's expropriations, leading to the kind of foreign affairs friction from the ignominious heyday of the ATS. This situation looks unlikely to result for two reasons. First, an expansion of the expropriation exception will still lead to relatively controlled outcomes, since the statutory provision still requires that property rights be at issue *and* that the property satisfy a commercial nexus with the United States.[191] Second, courts retain other methods of declining jurisdiction on a discretionary basis. The Supreme Court has previously noted that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*."[192] "[A] district

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189 Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) (quoting *Verlinden*, 461 U.S. at 488).

190 *Id.* at 140 (quoting *Verlinden*, 461 U.S. at 486).

191 28 U.S.C. § 1605(a)(3).

192 *Verlinden*, 461 U.S. at 490 n.15. The Act's legislative history seems to corroborate this conclusion. *See Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Rels. of the H. Comm. on the Judiciary*, 93d Cong. 48 (1973) (joint statement of Richard G. Kleindienst, Att'y Gen., and William P. Rogers, Sec'y of State) (explaining that nothing

court has discretion to respond at once to a defendant's *forum non conveniens* plea, . . . [before] any other threshold objection."[193]

In fact, in the Seventh Circuit Hungarian litigation that this Note has covered extensively, the panel dismissed on forum non conveniens grounds claims against a private bank that the plaintiffs had also sued in their action.[194] One of the public interest factors courts consider in a forum non conveniens plea, the "local interest in having localized controversies decided at home," can justify declining jurisdiction for many of the same reasons that the Seventh Circuit cited prudential exhaustion.[195] But forum non conveniens is better than the prudential exhaustion doctrine because it is available to the same extent to private actors in analogous lawsuits — thus honoring the FSIA's purpose of parity between sovereigns (once they do not have immunity) and equivalent private actors, while heeding the *NML* Court.

Moreover, there is no path here where a court can evade uncomfortable inquiries into, and pronouncements about, another sovereign. Plaintiffs can avoid having to "exhaust" foreign remedies by showing that pursuing them would be futile or a sham.[196] To prove that, plaintiffs bundle numerous allegations about the foreign state's judiciary and society — which both prolongs the litigation and drags courts into evaluating intimate and sensitive aspects of another sovereign anyway.[197]

Therefore, in an FSIA lawsuit, if a court will be stuck in a delicate situation, it would do better to act on grounds that Congress has authorized and that are equitable across foreign sovereigns and analogous private actors. Courts should gravitate to the forum non conveniens doctrine instead of applying the ill-advised and ill-fitting prudential exhaustion doctrine. They can achieve their original goals while being more faithful to the statutory text, congressional intent, and international law — instead of making promises to plaintiffs about "open doors" in the future that res judicata would prohibit them from fulfilling.

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in the proposed legislation was "intended to in any way alter the statutory or common law doctrine of *forum non conveniens*").

193 Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007).

194 Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 871 (7th Cir. 2015).

195 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

196 *See* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 681 (7th Cir. 2012).

197 When the D.C. Circuit remanded the Hungarian plaintiffs' expropriation lawsuit to the district court to determine whether the plaintiffs should be made to exhaust Hungarian remedies, Simon v. Republic of Hungary, 812 F.3d 127, 151 (D.C. Cir. 2016), the district court had to adjudicate and issue statements on the rise of anti-Semitism in Hungary; the Hungarian judiciary's independence; the Hungarian parliament's recent actions restricting domestic courts; and the controversial removal of the country's Chief Justice, Simon v. Republic of Hungary, 277 F. Supp. 3d 42, 60–62 (D.D.C. 2017), *rev'd and remanded*, 911 F.3d 1172 (D.C. Cir. 2018), *cert. granted*, No. 18-1447, 2020 WL 3578676 (U.S. July 2, 2020). The Seventh Circuit had to do the same. *See Fischer*, 777 F.3d at 862–66.