

# Exhaustion of Local Remedies and the FSIA Takings Exception: The Case for Deferring to the Executive’s Recommendation

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*The Takings Exception to the Foreign Sovereign Immunities Act (FSIA) abrogates the defense of sovereign immunity when a foreign government takes property in violation of international law. But the exception does not specify whether plaintiffs must first exhaust local remedies in the relevant foreign country before filing suit in the United States. In the absence of clear statutory guidance, the circuit courts have reached divergent conclusions: the Seventh Circuit has held that the exhaustion rule is required under customary international law, the Ninth Circuit has suggested that courts could impose it at their discretion for reasons of comity, and the DC Circuit has determined that courts cannot impose the exhaustion rule under any circumstance.*

*This Comment argues that international law does not obligate US courts to impose the exhaustion rule and that they should not impose it at their discretion because doing so would conflict with congressional intent in a sensitive area of foreign policy. Courts should, however, require international takings plaintiffs to exhaust local remedies when the president advises them that the requirement would advance the national security or foreign policy interests of the United States. Granting a limited amount of deference to the executive branch resolves the circuit split in a manner that respects the intent of the FSIA while also minimizing undue judicial interference in the nation’s relationship with foreign countries.*

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## INTRODUCTION

By 1976, Congress recognized that foreign states and their business enterprises were common participants in the global economy, often transacting with US citizens. It further recognized that there were no uniform or comprehensive rules governing when and how private parties could bring suit against those foreign governments in the courts of the United States.<sup>1</sup> The Foreign Sovereign Immunities Act of 1976<sup>2</sup> (FSIA) was enacted to address these concerns. The Act grants foreign states sovereign immunity from federal and state jurisdiction as a general rule but carves out a number of exceptions.<sup>3</sup> Among them is the expropriation exception, which revokes the defense of sovereign immunity when a foreign state seizes property in violation of international law. For the exception to apply, either the property or the foreign state actor at issue must have some commercial nexus with the United States.<sup>4</sup>

Circuit courts disagree about whether plaintiffs must exhaust local remedies in the relevant foreign country before filing suit in the United States under the expropriation exception. The Seventh Circuit holds that the exception requires courts to apply substantive international law when determining whether the plaintiff's property has been expropriated. This carries with it the jurisdictional limitations of international law, including the exhaustion of local remedies requirement.<sup>5</sup> The Ninth Circuit argues, however, that the only permissible limits on the jurisdiction of federal courts are those found in Article III of the Constitution

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<sup>1</sup> See HR Rep No 94-1487, 94th Cong, 2d Sess 6–7 (1976), reprinted in 1976 USCCAN 6604, 6604–05.

<sup>2</sup> Pub L No 94-583, 90 Stat 2891 (1976), codified in various sections of Title 28.

<sup>3</sup> See 28 USC §§ 1604–07.

<sup>4</sup> See 28 USC § 1605(a)(3). See also *Philipp v Federal Republic of Germany*, 894 F3d 406, 410 (DC Cir 2018) (*Philipp I*), cert granted, *Germany v Philipp*, 2020 WL 3578677.

<sup>5</sup> See *Fischer v Magyar Allamvasutak Zrt*, 777 F3d 847, 854–55 (7th Cir 2015).

and federal statutes. A jurisdictional limitation of international law, like the exhaustion of local remedies requirement, cannot be binding.<sup>6</sup> The court, however, remains open to the possibility of applying the rule on a discretionary basis.<sup>7</sup> The DC Circuit, meanwhile, concludes that the exhaustion requirement cannot be applied in any fashion. It holds that Congress enacted the FSIA as a comprehensive statement of the rules governing sovereign immunity and that there is no basis for an exhaustion requirement in the statutory language.<sup>8</sup>

There is one question at the heart of the circuit split: Do courts have authority to require that plaintiffs exhaust local remedies before suing a foreign government under the expropriation exception? In order to clarify how and why this question has arisen in the case law, Part I explains the origins of the FSIA, the scope of the expropriation exception, and the circuit split. Part II then addresses whether exhaustion is a mandatory rule under international law that US courts are obligated to apply. It concludes that the exhaustion rule—as understood within international law—might only apply to international courts, would not necessarily bind US courts (even if applicable in the domestic context), and would create a preclusion trap if it did. Part III addresses whether courts could impose the exhaustion rule at their discretion. It concludes that the FSIA does not explicitly prohibit discretionary exhaustion, but that such a rule would conflict with congressional intent in the area of foreign policy and is therefore inappropriate. Part IV addresses the DC Circuit’s view that the FSIA forbids the courts from requiring exhaustion. It concludes that the view is mistaken as a matter of statutory interpretation. Part V, finally, proposes that the courts should accord strong persuasive weight to the executive branch when it requests an application of the exhaustion rule to a case brought under the expropriation exception.

This Comment argues, in brief, that the only circumstance in which the exhaustion requirement would be appropriate is when the president determines that it would advance the national interest and expressly recommends it for a specific case. This position has the unique virtue of ensuring that courts do not unduly interfere with the nation’s foreign policy objectives, while still

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<sup>6</sup> *Cassirer v Kingdom of Spain*, 580 F3d 1048, 1061–62 (9th Cir 2009) (*Cassirer II*).

<sup>7</sup> See *Cassirer v Kingdom of Spain*, 616 F3d 1019, 1036–37 (9th Cir 2010) (en banc) (*Cassirer III*).

<sup>8</sup> See *Philipp I*, 894 F3d at 416.

respecting the will of Congress as expressed through the FSIA. It would be similar to the kind of deference that courts have afforded the executive branch in other contexts involving foreign policy. And it is amply justified by the president's distinct authority in the realm of international relations.

## I. BACKGROUND

The dispute between the circuit courts cannot be dismissed as intercircuit quibbling over procedural minutiae. It is important to foreign governments because they may incur substantial liability if expropriation suits are litigated (in the first instance) in the United States. It is important for the United States because it implicates broader questions about the status of international law in the US legal system and the balance of power among the three branches of government in the realm of foreign affairs. But to see how these important questions arise, we must first understand what prompted this intercircuit dispute over the exhaustion rule. Accordingly, this Part provides a general overview of the history of the Foreign Sovereign Immunities Act. It then explores the types of disputes that have arisen under the expropriation exception and the various arguments the circuit courts have adduced to support or reject the exhaustion requirement.

### A. The Foreign Sovereign Immunities Act

The United States originally applied the absolute theory of sovereign immunity to shield foreign governments from suit in all circumstances.<sup>9</sup> This system, however, proved inadequate to protect the rights of private parties who entered into contracts with foreign governments.<sup>10</sup> In 1952, the State Department adopted the restrictive theory of sovereign immunity, under which foreign governments are immune from civil court jurisdiction only with respect to their public acts, not their private commercial transactions.<sup>11</sup> This, too, yielded inadequate results, as the Department

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<sup>9</sup> See Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 *Intl & Comp L Q* 302, 303 (1986). Mark Feldman was the deputy legal adviser of the State Department, in which capacity he helped to draft the FSIA.

<sup>10</sup> See *id.* at 303.

<sup>11</sup> *Id.* The shift in policy was famously announced in the "Tate Letter"—a document drafted by the State Department's acting legal adviser, Jack B. Tate, and addressed to the acting US attorney general, Philip B. Perlman. Letter from Jack B. Tate, Acting Legal

often felt it necessary to recommend sovereign immunity to the courts in furtherance of its foreign policy objectives, and the courts generally deferred to that judgment.<sup>12</sup> Foreign governments, moreover, remained absolutely immune from the execution of judgments, making private suits practically inconsequential.<sup>13</sup>

In 1976, Congress passed the FSIA in order to formally codify the restrictive theory, free the determination of sovereign immunity from political pressures, and standardize the procedures governing lawsuits against foreign governments.<sup>14</sup> The Act formally confers upon foreign governments an immunity from suit in federal and state courts but includes several exceptions.<sup>15</sup> Among them is the expropriation exception, which states that “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue.”<sup>16</sup> For the exception to apply, two conditions must be met: (1) the plaintiff must have rights in property taken in violation of international law and (2) the expropriated property or the foreign state agency or instrumentality that controls the property must have some commercial nexus with the United States.<sup>17</sup>

## B. The Scope of the Expropriation Exception

The courts tend to construe the scope of the FSIA exceptions broadly. The Supreme Court has ruled, for example, that anyone—whether a citizen of the United States or not—can bring an action under any of the statute’s exceptions,<sup>18</sup> and that the FSIA’s provisions apply to foreign state actions that occurred before the statute was enacted.<sup>19</sup> This pattern of broad interpretation extends to the expropriation exception as well. For example, the expropriation exception ordinarily does not apply to a foreign state’s seizure of the property of its own citizens. But courts have been

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Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952), 26 Dept St Bull 984 (1952).

<sup>12</sup> Feldman, 35 Intl & Comp L Q at 303–04 (cited in note 9).

<sup>13</sup> See id at 304.

<sup>14</sup> Id at 304–05.

<sup>15</sup> See 28 USC §§ 1604–07. For example, exceptions exist for suits “based upon a commercial activity carried on in the United States by the foreign state” and for damages arising from a state’s sponsorship of terrorism. 28 USC §§ 1605(a)(2), 1605A(a)(1).

<sup>16</sup> 28 USC § 1605(a)(3).

<sup>17</sup> See 28 USC § 1605(a)(3). See also *Philipp v Federal Republic of Germany*, 894 F3d 406, 410 (DC Cir 2018) (*Philipp I*), cert granted, *Germany v Philipp*, 2020 WL 3578677.

<sup>18</sup> *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480, 490 (1983).

<sup>19</sup> *Republic of Austria v Altmann*, 541 US 677, 697 (2004).

willing to suspend that rule when the relevant state did not regard the plaintiff as a citizen—as illustrated in the case of German Jews under the Third Reich.<sup>20</sup> Some courts have gone so far as to conclude that a taking “in violation of international law” encompasses not just seizures that violate international takings law but seizures in furtherance of genocide.<sup>21</sup> In other words, a plaintiff might be able to establish jurisdiction under the expropriation exception without demonstrating that the property at issue was taken without just compensation. That the taking was part of a program of genocide would be enough.

This liberal construction of the expropriation exception has transformed the provision into an instrument of human rights litigation. As Professor Vivian Curran notes in her recent article on the FSIA, “plaintiffs who had been victims of the Holocaust or Armenian Genocide tend to frame claims for property expropriation where the property at issue might be of trivial value, but coexisted with physical and moral atrocities the victim had undergone.”<sup>22</sup> In one such case, the grandsons of two Armenian property owners brought a class action against Turkey for the forced relocation, expropriation, torture, and murder of ethnic Armenians during the First World War.<sup>23</sup> The taking of real property was the purported basis for FSIA jurisdiction, but the most serious causes of action included violations of human rights.<sup>24</sup> These examples show that some plaintiffs have used trivial violations of property rights as a basis for FSIA jurisdiction to litigate very serious human rights claims.<sup>25</sup>

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<sup>20</sup> See, for example, *Cassirer v Kingdom of Spain*, 461 F Supp 2d 1157, 1165–66 (CD Cal 2006) (*Cassirer I*) (“[S]ince Germany itself did not consider Ms. Cassirer to be a citizen, Ms. Cassirer’s alleged German ‘citizenship’ at the time of the taking does not preclude the application of the expropriation exception.”), *affd in part and revd in part*, 580 F3d 1048 (9th Cir 2009).

<sup>21</sup> See, for example, *Abelesz v Magyar Nemzeti Bank*, 692 F3d 661, 675–76 (7th Cir 2012) (interpreting 28 USC § 1605(a)(3) and finding that the expropriation of Jewish property during the Holocaust effectuated genocide, and, for that reason, could constitute a taking in violation of international law). See also *Simon v Republic of Hungary*, 812 F3d 127, 142–43 (DC Cir 2016) (reaching the same conclusion when an expropriation not just furthers but constitutes, *in itself*, an act of genocide). After remand, the *Simon* case returned to the DC Circuit where the court held that the FSIA did not require exhaustion of local remedies. See generally *Simon v Republic of Hungary*, 911 F3d 1172 (DC Cir 2018), cert granted, *Hungary v Simon*, 2020 WL 3578676.

<sup>22</sup> Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act’s Evolving Genocide Exception*, 23 *UCLA J Intl L & Foreign Affairs* 46, 50 (2019).

<sup>23</sup> *Davoyan v Republic of Turkey*, 116 F Supp 3d 1084, 1092–93 (CD Cal 2013).

<sup>24</sup> *Id.* at 1093.

<sup>25</sup> This does not, of course, imply that such suits are always successful. *Davoyan*, for instance, was dismissed because the question whether the Ottoman Empire’s mass

Other plaintiffs, meanwhile, have attempted to use the expropriation exception to obtain restitution from foreign governments for the uncompensated seizure of art during the Second World War. The descendants of a Jewish art collector, for example, sued Hungary to reclaim pieces on display at the Hungarian National Gallery and other museums. The pieces were originally owned by the plaintiffs' family but were later confiscated by the Hungarian government in collaboration with the Nazis.<sup>26</sup> In another case, the heir of another wealthy Jewish art collector sued Spain to reclaim a collection that his family member had sold to the Nazis under duress.<sup>27</sup> Here, unlike in the genocide cases, plaintiffs primarily seek the return of (or compensation for) the expropriated property itself. And so the expropriation exception provides a particularly apt means of establishing jurisdiction to sue the offending state.

The potential damages in the genocide and art restitution cases are immense. In one lawsuit challenging Hungary's role in expropriating Jewish property during the Holocaust, the plaintiffs sought \$75 billion in damages—nearly 40 percent of the country's GDP at the time.<sup>28</sup> The art restitution damages can also reach stratospheric heights, sometimes in the hundred-million-dollar range.<sup>29</sup> At least one commentator, for this reason, has likened the restitution cases to the tobacco litigation of the twentieth century.<sup>30</sup>

With hundreds of millions of dollars at stake, it is a question of supreme importance whether foreign states are at least owed an opportunity to redress expropriation claims through their own domestic procedures.

### C. Circuit Split on the Exhaustion of Local Remedies

The circuit courts have uniformly held that nothing in the statutory language of the expropriation exception requires

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relocation of ethnic Armenians constituted genocide was a nonjusticiable political question. See *id.* at 1104.

<sup>26</sup> *De Csepel v Republic of Hungary*, 714 F3d 591, 595–96 (DC Cir 2013).

<sup>27</sup> *Cassirer v Kingdom of Spain*, 580 F3d 1048, 1052–53 (9th Cir 2009) (*Cassirer II*).

<sup>28</sup> *Abelesz*, 692 F3d at 682.

<sup>29</sup> See Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 *Fordham Intl L J* 781, 785 (2008).

<sup>30</sup> *Id.* at 781 ("Art and antiquities restitution cases may be the tobacco litigation of this decade, thanks to the jurisdiction-granting provisions of the Foreign Sovereign Immunities Act.").

plaintiffs to exhaust local remedies before filing suit in US courts.<sup>31</sup> But while some courts conclude their analysis upon making this observation, others proceed to import an exhaustion requirement from customary international law. The Supreme Court has not resolved the matter one way or another, but it has indicated that, “in an appropriate case,” the Court would consider the argument that plaintiffs must exhaust local remedies before suing in a US court.<sup>32</sup>

The Seventh Circuit applies an exhaustion requirement. The court first endorsed this position in *Abelesz v Magyar Nemzeti Bank*.<sup>33</sup> There, a group of Holocaust survivors brought suit against the Hungarian national bank and the Hungarian national railway for their roles in expropriating property from Hungarian Jews during the Holocaust.<sup>34</sup> The Seventh Circuit concluded that “the requirement that domestic remedies for expropriation be exhausted before international proceedings may be instituted is ‘a well-established rule of customary international law’ that the United States itself has invoked”<sup>35</sup> and should “be prepared to reciprocate.”<sup>36</sup> The court ultimately remanded the case with instructions that the plaintiffs “either exhaust any available Hungarian remedies identified by the national bank and national railway or present to the district court a legally compelling reason for their failure to do so.”<sup>37</sup>

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<sup>31</sup> See, for example, *Abelesz*, 692 F3d at 678 (“On the statutory exhaustion point, nothing in § 1605(a)(3) suggests that plaintiffs must exhaust domestic Hungarian remedies before bringing suit in the United States.”); *Cassirer v Kingdom of Spain*, 616 F3d 1019, 1034 (9th Cir 2010) (en banc) (*Cassirer III*) (“The expropriation exception says nothing at all about exhaustion of remedies.”); *Agudas Chasidei Chabad of United States v Russian Federation*, 528 F3d 934, 948 (DC Cir 2008) (“As a preliminary matter, nothing in § 1605(a)(3) suggests that plaintiff must exhaust foreign remedies before bringing suit in the United States.”).

<sup>32</sup> *Sosa v Alvarez-Machain*, 542 US 692, 733 n 21 (2004). *Sosa*, to be sure, was primarily concerned with when courts can hear international law claims brought under the Alien Tort Statute, not the FSIA. But in a footnote, the Court expressed its willingness to apply the exhaustion requirement in broad terms. Specifically, it framed exhaustion as a potential limit on “the availability of relief in the federal courts for violations of customary international law.” *Id.* This suggests that the Court would be equally receptive to an exhaustion requirement when an international law claim is brought under the FSIA.

<sup>33</sup> 692 F3d 661 (7th Cir 2012).

<sup>34</sup> *Id.* at 665.

<sup>35</sup> *Id.* at 679, quoting *Interhandel (Switzerland v United States of America)*, 1959 ICJ 6, 26–27.

<sup>36</sup> *Id.* at 680.

<sup>37</sup> *Abelesz*, 692 F3d at 666.



The Seventh Circuit recently reaffirmed this position in *Fischer v Magyar Államvasutak Zrt.*<sup>38</sup> The court found that “[a]t bottom, international law favors giving a state accused of taking property in violation of international law an opportunity to redress it by its own means, within the framework of its own legal system before the same alleged taking may be aired in foreign courts.”<sup>39</sup> The court also denied that the absence of an exhaustion requirement in the text of the FSIA precludes application of the doctrine. Such a reading, it noted, would cast doubt on the application of established doctrines of federal common law like *forum non conveniens*.<sup>40</sup>

The DC Circuit, by contrast, insists that reading in an exhaustion requirement from customary international law would vitiate the very purpose of the FSIA. In *Philipp v Federal Republic of Germany*,<sup>41</sup> (*Philipp I*) a group of Frankfurt-based art dealers were forced to sell their collection to the Nazis at a fraction of its worth. In 2014, their heirs demanded the return of the artworks, first by referring their claim to an advisory commission, and then by filing suit against Germany in the DC District Court.<sup>42</sup> The DC Circuit, following the reasoning from an earlier Supreme Court case,<sup>43</sup> asserted that the purpose of the FSIA was to replace the executive-driven, case-by-case application of sovereign immunity with a clear statutory framework. Hence, the courts cannot look to extrinsic common law doctrines like the exhaustion of local remedies if they are entirely absent from the text of the statute.<sup>44</sup>

The court identified two additional problems with Germany’s exhaustion argument, stemming from other provisions of the FSIA. First, the terrorism exception expressly conditions jurisdiction on “afford[ing] the foreign state a reasonable opportunity to

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<sup>38</sup> 777 F3d 847 (7th Cir 2015).

<sup>39</sup> *Id* at 855 (quotation marks omitted).

<sup>40</sup> *Id* at 859.

<sup>41</sup> 894 F3d 406 (DC Cir 2018) (*Philipp I*), cert granted, *Germany v Philipp*, 2020 WL 3578677.

<sup>42</sup> *Id* at 409–10.

<sup>43</sup> See *Republic of Argentina v NML Capital, Ltd.*, 573 US 134, 141 (2014) (“Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]’s comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.”) (quotation marks omitted).

<sup>44</sup> *Philipp I*, 894 F3d at 415. Note, for future reference, that the exhaustion of local remedies is both a doctrine of federal common law, see Part III.A, and, separately, a doctrine of customary international law, see Part II.A.

arbitrate the claim,” but this language is not in the expropriation exception.<sup>45</sup> And second, a separate provision of the FSIA “permits only defenses, such as forum non conveniens, that are equally available to private individuals. Obviously a private individual cannot invoke a *sovereign’s* right to resolve disputes against it.”<sup>46</sup>

Judge Gregory Katsas vigorously argued for an exhaustion defense in his dissent from the DC Circuit’s denial of a petition for en banc rehearing. He argued, among other things, that the decision “disregard[s] the views of the Executive Branch on a matter of obvious foreign-policy sensitivity” and “clear[s] the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories. This includes claims not only for genocide, but also for the violation of most other norms of international human-rights law.”<sup>47</sup> Moreover, he insisted, the FSIA does not preclude, but rather “affirmatively accommodates” the exhaustion defense, because § 1606 of the Act states that when a claim falls within one of the sovereign immunity exceptions, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”<sup>48</sup> Judge Katsas took this to mean that the state would be able to avail itself of the same defenses available to private defendants sued under the Alien Tort Statute<sup>49</sup> (ATS), among them the exhaustion doctrine.<sup>50</sup>

The Ninth Circuit denied that the exhaustion doctrine could be a jurisdictional requirement binding on a federal court but was willing to apply the exhaustion rule on a discretionary basis. In *Cassirer v Kingdom of Spain*,<sup>51</sup> a member of a wealthy Jewish family, then residing in Germany, was forced to sell her valuable painting to a Nazi art dealer as a precondition for permission to leave the country. After several resales to private art collectors,

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<sup>45</sup> *Philipp I*, 894 F3d at 415 (quotation marks omitted) (alterations in original), quoting 28 USC § 1605A(a)(2)(A)(iii).

<sup>46</sup> *Philipp I*, 894 F3d at 416 (quotation marks, citation, and alterations omitted) (emphasis in original).

<sup>47</sup> *Philipp v Federal Republic of Germany*, 925 F3d 1349, 1350 (DC Cir 2019) (*Philipp II*) (Katsas dissenting from denial of rehearing en banc).

<sup>48</sup> *Id.* at 1355 (quotation marks omitted), quoting 28 USC § 1606.

<sup>49</sup> 1 Stat 73, 76–77, codified as amended at 28 USC § 1350.

<sup>50</sup> *Philipp II*, 925 F3d at 1355–56 (Katsas dissenting from denial of rehearing en banc) (noting that the majority in *Sosa* was willing to consider applying the exhaustion requirement “in an appropriate case,” and that four justices had openly embraced the requirement in several recent ATS cases).

<sup>51</sup> 580 F3d 1048 (9th Cir 2009) (*Cassirer II*), *affd* in part and dismissed in part, 616 F3d 1019 (9th Cir 2010) (en banc).

the piece was eventually purchased by the Spanish government and displayed in the Thyssen-Bornemisza Museum. One of her heirs filed suit in the Central District of California to recover the piece.<sup>52</sup> The Ninth Circuit declared that “[i]nternational law may define the substantive rights of parties in actions permitted by the FSIA, but it cannot compel or restrict Article III jurisdiction.”<sup>53</sup> At the same time, however, the court was willing to “exercise sound judicial discretion and consider exhaustion on a prudential, case-by-case basis.”<sup>54</sup> The Ninth Circuit, on rehearing en banc, confirmed the panel’s conclusion that “exhaustion is not a statutory prerequisite to jurisdiction” because it is not mentioned in the FSIA.<sup>55</sup> However, because prudential or discretionary exhaustion is not a precondition for jurisdiction, the court declined to consider whether it might apply to the case at bar.<sup>56</sup>

In brief, the Seventh Circuit considers the exhaustion rule mandatory, the Ninth Circuit deems it discretionary, and the DC Circuit finds it unauthorized and impermissible. This Comment contends that all three positions are flawed—the first two for permitting exhaustion without the express authorization of Congress or the president, and the last for overlooking the possibility of deference. This Comment addresses the error in each approach in turn and proposes a system granting deference to the president.

## II. MANDATORY EXHAUSTION

There are two suppositions at the heart of the Seventh Circuit’s argument that the exhaustion rule is mandatory. The first is that the exhaustion of local remedies is an established rule of customary international law that applies in domestic (not just international) courts. The second is that the norms of international law are operable in the courts of the United States without prior federal legislation adopting those norms. This Part argues that the first supposition is plainly untrue and that the second is unsettled. Furthermore, a mandatory exhaustion rule would generate a preclusion trap, which is strongly disfavored by recent Supreme Court precedent.

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<sup>52</sup> Id at 1052–53.

<sup>53</sup> Id at 1061–62.

<sup>54</sup> Id at 1062.

<sup>55</sup> *Cassirer III*, 616 F3d at 1034.

<sup>56</sup> Id at 1037.

## A. Exhaustion as an Established Rule of International Law

Exhausting local remedies was originally required before an alien whose rights had been violated abroad could receive diplomatic protection—that is, the assumption of her claim by her own government.<sup>57</sup> This rule was conceived at a time when states (as opposed to individuals) were considered the sole subjects of international law; states were the agents upon whom international law could confer rights and impose obligations.<sup>58</sup> One jurist theorized that such assumption or internationalization of the private claim was necessary for the citizen to “obtain the chief end of civil society, which is protection.”<sup>59</sup> The exhaustion rule, then, was a “prophylactic device . . . [that] reduce[d] tension likely to arise in an inter-State dispute over injuries to nationals abroad.”<sup>60</sup> It benefited both the injured alien, in that he would more likely obtain prompt relief by seeking local remedies, and the opposing sovereigns, in that their incipient dispute would more likely be resolved through ordinary domestic procedures.<sup>61</sup>

Exhaustion also appears as a condition for accepting human rights complaints under the Covenant on Civil and Political Rights and the European Convention on Human Rights.<sup>62</sup> The Convention allows the “High Contracting Parties” (states) to bring a complaint of breach by another High Contracting Party before the European Commission—not to subsume the rights of its own nationals, but rather to enforce the public order the convention seeks to protect.<sup>63</sup> Individuals may also bring complaints before the Commission after exhausting local remedies.<sup>64</sup> Exhaustion serves a different function in human rights treaties than it does in the context of diplomatic protection. The purpose of exhaustion in the human rights context is not to promote comity or to diffuse interstate tension. Rather, it is “to avoid domestic courts being superseded by the international organ . . . [and] to avoid the international organ being ‘flooded’ with irrelevant

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<sup>57</sup> See A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* 7 (Cambridge 1983).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (quotation marks omitted).

<sup>60</sup> *Id.* at 11 (quotation marks omitted).

<sup>61</sup> Trindade, *Exhaustion of Local Remedies in International Law* at 11–12 (cited in note 57).

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 16.

<sup>64</sup> *Id.* at 17–18.

complaints.”<sup>65</sup> Diffusing interstate tension in the human rights context is less important because states voluntarily accede to the treaties that plaintiffs seek to enforce.<sup>66</sup> This suggests that the exhaustion rule is not a generally applicable principle of international law, but one that applies in two very specific contexts, serving distinct purposes.

So what is it that led the Seventh Circuit to view the exhaustion of local remedies as a general rule for all courts applying international law? The court rested much of its reasoning on *Interhandel (Switzerland v United States)*,<sup>67</sup> a case decided by the International Court of Justice (ICJ) in 1959.<sup>68</sup> In that case, the United States seized a subsidiary of a Swiss company, Interhandel, pursuant to the Trading with the Enemy Act shortly after entering the Second World War. The US government believed that Interhandel was controlled by a German parent company despite Interhandel’s protestations that it had severed ties with the German company well before the United States had entered the war. After years of disagreement over the status of Interhandel and stalled litigation before the DC District Court, Switzerland brought an action before the ICJ to restore the assets of its national.<sup>69</sup> The United States argued, among other things, that Switzerland needed to exhaust remedies in the United States before resorting to the ICJ. The ICJ agreed, finding that the Supreme Court of the United States had granted certiorari to the Interhandel suit and that Switzerland needed to avail itself of this further opportunity to obtain redress through US legal procedures.<sup>70</sup> In so doing, the court unambiguously affirmed the validity of exhaustion as a rule in customary international law:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the 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

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<sup>65</sup> Trindade, *Exhaustion of Local Remedies in International Law* at 3 (cited in note 57).

<sup>66</sup> *Id.* at 51.

<sup>67</sup> 1959 ICJ 6.

<sup>68</sup> See generally *id.*, cited in *Abelesz*, 692 F3d at 680–81.

<sup>69</sup> *Interhandel*, 1959 ICJ at 16–19.

<sup>70</sup> *Id.* at 26–27.

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.<sup>71</sup>

The ICJ's description of the rule appears to support the Seventh Circuit's view that exhaustion of local remedies is a customary rule of international law. Crucially, however, this was an instance of diplomatic protection. Switzerland had brought the lawsuit on behalf of Interhandel, placing the case squarely in one of the two distinct categories in which the exhaustion of local remedies has historically been required—diplomatic protection and human rights complaints. This means that the case lends no support to the application of an exhaustion requirement outside those two contexts. Furthermore, the rule, as stated by the ICJ, seems limited to disputes brought before an *international* court and in which the opposing parties are *states*. It is not clear whether the exhaustion of local remedies rule applies to claims by private individuals before domestic tribunals. One could argue that because, in the context of diplomatic protection, the exhaustion requirement serves to diffuse tensions between states, it can only apply when two states are parties before an international body, not when a private individual sues a foreign state (as is the case with FSIA disputes). But the jurisdiction-granting provisions of the FSIA subject foreign states to the procedures, judgments, and penalties of US courts. Although the countries are not parties to a dispute, their interests are at variance all the same. So if exhaustion of local remedies does not apply in the domestic context, it is certainly not for want of interstate tension. The better argument is that the doctrine does not apply in the domestic context because there is no authority that frames the doctrine in terms capacious enough to support that application.

All of this is to say that the exhaustion doctrine is indeed an established rule within international law. But the doctrine is usually either applied in the context of diplomatic protection or stated within the text of international conventions and resolutions (the European Convention on Human Rights, for example), and is invoked by international bodies attempting to comply with such agreements. The reasons for applying it—diffusing interstate tension and avoiding irrelevant complaints, for example—could be relevant in domestic courts. Indeed, when a domestic court

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<sup>71</sup> *Id.* at 27.

adjudicates a private dispute against a foreign country, that could generate tension between the forum country and the foreign state defendant. And domestic courts are no less susceptible to the kinds of frivolous lawsuits that partly justify the exhaustion requirement in international courts. However, this only suggests that there may be reason to develop an exhaustion requirement for domestic courts applying customary international law. It is not sufficient to show that such a requirement, applicable to domestic courts, already exists.

#### B. The Authority of International Law in US Domestic Courts

Even if international law required the exhaustion of local remedies to assert a claim for expropriation in domestic courts, it would not necessarily follow that US courts could apply that rule without prior congressional authorization. There are two dominant—and divergent—strains of thought on whether customary international law has direct, binding effect in the United States. The modern view holds that customary international law is self-executing—it is automatically federal law, it preempts contrary state law, and it need not be adopted by the political branches before doing so. To be sure, principles of international law, on this view, cannot be applied if they conflict with existing federal law and can still be nullified by subsequent congressional legislation. But they are operable in the absence of such legislation.<sup>72</sup> Some courts and commentators justify this position on the ground that federal courts have the authority to incorporate rules of international law into the federal common law.<sup>73</sup> The competing revisionist view, however, holds that there is no history among the courts of treating international law as federal law. Rather, customary international law was considered “federal general common law” of the kind *Erie Railroad Co v Thompkins*<sup>74</sup> invalidated.<sup>75</sup> The political branches would have to explicitly incorporate customary

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<sup>72</sup> For discussion of such a view, see Gary Born, *Customary International Law in United States Courts*, 92 Wash L Rev 1641, 1648–49 (2017). See also *The Paquete Habana*, 175 US 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”); *Filartiga v Pena-Irala*, 630 F2d 876, 887 n 20 (2d Cir 1980) (“[I]nternational law has an existence in the federal courts independent of acts of Congress.”).

<sup>73</sup> See Born, 92 Wash L Rev at 1649 (cited in note 72).

<sup>74</sup> 304 US 64 (1938).

<sup>75</sup> Id at 78. See also Born, 92 Wash L Rev at 1650–51 (cited in note 72).

international law through legislation before it could be considered preemptive federal law.<sup>76</sup>

The Supreme Court has not definitively resolved the matter one way or another—and its most pertinent case on this question, *Sosa v Alvarez-Machain*,<sup>77</sup> is amenable to various contradictory interpretations. In *Sosa*, a Mexican national, Humberto Alvarez-Machain, was indicted for allegedly torturing and murdering an agent of the Drug Enforcement Administration (DEA). A group of Mexican civilians and a Mexican DEA operative forcibly abducted Alvarez-Machain from his home and transported him to Texas, where he was arrested.<sup>78</sup> After being acquitted of the charges, Alvarez-Machain brought a civil action seeking damages both from the United States for false arrest under the Federal Tort Claims Act, and from the Mexican DEA agent for violations of international law under the ATS.<sup>79</sup> One of the questions before the Court was whether the ATS (or any other source of US law) gave the plaintiff the right to sue for the alleged violations of international law.<sup>80</sup>

The ATS grants federal jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations . . . .”<sup>81</sup> The Court noted that since the statute is purely jurisdictional, it confers no *statutory* cause of action for torts in violation of international law.<sup>82</sup> However, the Court found it implausible that the First Congress would have enacted the ATS “as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action.”<sup>83</sup> Thus, as the Court concluded, the First Congress must have envisaged that courts would recognize a *common law* cause of action for some international torts.<sup>84</sup> Partly on the basis of this reasoning, the Court then ruled that

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<sup>76</sup> See *id.* at 1650; *Al-Bihani v Obama*, 619 F3d 1, 13 (DC Cir 2010) (Kavanaugh concurring in denial of rehearing en banc) (“Only when international-law principles are incorporated into a statute or a self-executing treaty do they become domestic U.S. law enforceable in U.S. courts.”).

<sup>77</sup> 542 US 692 (2004).

<sup>78</sup> *Id.* at 697–98.

<sup>79</sup> *Id.* at 697–99.

<sup>80</sup> *Id.* at 700, 712.

<sup>81</sup> 28 USC § 1350.

<sup>82</sup> *Sosa*, 542 US at 713.

<sup>83</sup> *Id.* at 719.

<sup>84</sup> *Id.* at 724. The Court found that the First Congress likely had only a few specific and well-defined torts in mind, among them the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.*



courts can recognize, through the common law, those international law claims that “rest on a norm of international character accepted by the civilized world” and that are defined with “specificity.”<sup>85</sup>

The implications of this ruling for the ongoing debate about the status of customary international law in the United States remain unclear. The modernists could herald the ruling as an acknowledgment that some international law is directly binding, without needing to be enacted by the political branches.<sup>86</sup> However, the revisionists could also point to the limited nature of the Court’s conclusion as vindication for their own view.<sup>87</sup> Indeed, the holding permits courts to incorporate a narrow set of well-defined international law *claims* into the common law because without that power, the ATS would have been ineffectual at the time it was enacted. It does not suggest that any well-established *rule or doctrine* of customary international law is immediately applicable in US courts without statutory authorization.

Suffice it to say, then, it is not obvious that an exhaustion rule under international law would be automatically operable in domestic courts. This presents a problem for the Seventh Circuit and any other court that treats exhaustion as a mandatory rule of international law that domestic courts are obligated to apply. Those courts would need to rigorously justify the modernist assumptions underpinning their position, as this area of law remains unsettled and those assumptions may well be mistaken.

### C. The Possibility of a Preclusion Trap

The mandatory exhaustion rule would also permanently exclude some plaintiffs from US courts. Exhausting local remedies,

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<sup>85</sup> *Id.* at 725. For the full ruling, see *id.*:

[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [(violation of safe conducts, infringement of the rights of ambassadors, and piracy)] we have recognized.

<sup>86</sup> See, for example, Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 Vand L Rev 2241, 2255 (2004) (“In short, [*Sosa*] repudiates the revisionist view of international law according to which ATS human rights actions were intrinsically illegitimate.”).

<sup>87</sup> See, for example, Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv L Rev 869, 873 (2007) (“*Sosa* cannot reasonably be read as embracing the modern position and, indeed, is best read as rejecting it. . . . The Court in *Sosa* held that the ATS authorized federal courts to recognize federal common law causes of action for a narrow class of [customary international law] violations.”).

in many cases, would mean obtaining a judgment from a foreign court. Federal courts would then apply state law to determine whether that foreign judgment is entitled to recognition.<sup>88</sup> And the law in most states is that, as a general matter, a “final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition.”<sup>89</sup> Judgments so recognized are given “the same preclusive effect . . . as the judgment of a sister State entitled to full faith and credit.”<sup>90</sup> In other words, a litigant who loses his case abroad cannot relitigate the same claims in the courts of the United States. The problem is that the preclusive effect of foreign judgments, when paired with a mandatory exhaustion rule, might categorically bar victims of international expropriation from ever suing in the United States. They cannot sue without seeking and obtaining a foreign judgment, as that judgment would be an unexhausted local remedy. Nor can they sue after judgment is rendered because their claims would be precluded under *res judicata*.

Courts could not exercise equitable discretion to deny recognition of a foreign judgment just to avoid creating a preclusion trap. According to the Fourth Restatement of the Foreign Relations Law of the United States, “[c]ourts in the United States do not have general discretion under State law to deny recognition.”<sup>91</sup> Instead, the discretionary grounds for denying recognition of a foreign judgment are limited and well-defined. These include, for example, whether “the judgment was obtained by fraud” and whether it was “repugnant to the public policy” of a state or the United States.<sup>92</sup> The trap is thus effectively unavoidable even for courts sympathetic to the plaintiff’s plight.

A very similar conundrum had, until recently, plagued Fifth Amendment takings jurisprudence. In *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*,<sup>93</sup> the Supreme Court established that the exhaustion of state remedies was necessary for takings claims to be considered ripe in

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<sup>88</sup> See Restatement (Fourth) of the Foreign Relations Law of the United States § 481 n 1 (2018).

<sup>89</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 481 (2018).

<sup>90</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 487 (2018).

<sup>91</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 484 cmt 1 (2018).

<sup>92</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 484(b)–(c) (2018).

<sup>93</sup> 473 US 172 (1985).

federal court. The Court reasoned that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking.”<sup>94</sup> What is required “is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.”<sup>95</sup> The Court added that “[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.”<sup>96</sup> In essence, Fifth Amendment takings plaintiffs would need to exhaust state remedies before suing in federal court.

The exhaustion requirement imposed in *Williamson County*, however, was very recently overruled by a 5–4 decision of the Supreme Court in *Knick v Township of Scott, Pennsylvania*.<sup>97</sup> The Court reasoned that the *Williamson County* rule, when paired with the common law rule of claim preclusion, may have the practical effect of excluding all takings claims against a state from federal court. Once a state court enters final judgment against a plaintiff in a takings suit, that plaintiff generally cannot relitigate his claim in federal court.<sup>98</sup> As the Supreme Court explained, “[t]he takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.”<sup>99</sup> The Court pointed to the case of *San Remo Hotel, LP v City and County of San Francisco, California*<sup>100</sup> as an instance in which precisely this problem occurred.<sup>101</sup> Partly for this reason, the Court concluded that “the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.”<sup>102</sup>

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<sup>94</sup> Id at 194 (citation omitted).

<sup>95</sup> Id (quotation marks omitted).

<sup>96</sup> Id at 194–95 (quotation marks and alterations omitted).

<sup>97</sup> 139 S Ct 2162 (2019).

<sup>98</sup> Id at 2167.

<sup>99</sup> Id.

<sup>100</sup> 545 US 323 (2005).

<sup>101</sup> *Knick*, 139 S Ct at 2167. See also *San Remo Hotel*, 545 US at 327.

<sup>102</sup> *Knick*, 139 S Ct at 2167.

To be sure, there is some reason to think that the preclusion trap is unproblematic in practice. After all, a plaintiff can excuse her failure to exhaust local remedies by demonstrating that such remedies are “ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.”<sup>103</sup> Additionally, the integrity of the foreign court, the fairness of its proceedings, and the convenience of the forum are all among the valid discretionary grounds for non-recognition of a foreign judgment laid out in the Fourth Restatement.<sup>104</sup> The preclusion trap would thus occur only in those cases where the court has determined that the foreign judicial system and its remedies are worthy of respect. And it is perfectly sensible to prevent claims fairly and respectably adjudicated abroad from being relitigated.

But the implied promise of the exhaustion rule is that US courts are available once a plaintiff has tried and failed to obtain relief in the country he seeks to sue. If the law were designed to exclude victims of expropriation from US courts regardless of what they do, then one would expect a clear rule (from the courts or from Congress) stating as much. But no such rule has been stated, much less rationally justified. The preclusion trap is instead an unintended consequence of two unrelated legal principles working in tandem. And it leaves the impression that the courts have arbitrarily stumbled into a novel doctrinal result. The preclusion trap is thus one additional reason not to treat exhaustion as a mandatory rule.

### III. DISCRETIONARY EXHAUSTION

The Ninth Circuit, in approving a discretionary exhaustion requirement, borrowed its reasoning from administrative law. The Supreme Court had already articulated the following principles for the exhaustion of administrative remedies: “Of paramount importance to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.”<sup>105</sup> The Ninth Circuit correctly determined that the FSIA has no express provision for

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<sup>103</sup> See *Cassirer II*, 580 F3d at 1063 (quotation marks omitted), quoting *Sarei v Rio Tinto, PLC*, 550 F3d 822, 832 (9th Cir 2008).

<sup>104</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 484 cmts h–j (2018).

<sup>105</sup> *McCarthy v Madigan*, 503 US 140, 144 (1992) (quotation marks and citations omitted).

exhaustion of local remedies, but then proceeded to endorse exhaustion as a discretionary rule.<sup>106</sup> This Part demonstrates that the discretionary rule is, in fact, inconsistent with congressional intent. The expropriation exception and related federal law on international takings implicitly repudiate comity (as defined below) in expropriation cases. It follows that the exhaustion of local remedies, as a gesture of comity to a foreign state, violates the spirit of these statutes.

#### A. Exhaustion as a Gesture of Comity

In order to prove that discretionary exhaustion is inappropriate, we must first establish that exhaustion of local remedies, as applied in US courts, is rooted in comity. The principle of comity is not so much a well-defined legal doctrine as it is a friendly and deferential judicial posture toward the interests of another sovereign. The Supreme Court refers to it as the “spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”<sup>107</sup>

This spirit of cooperation has been cited as the basis for requiring parties to exhaust remedies in various contexts. Federal courts have, for example, required plaintiffs to exhaust remedies in tribal courts when the facts giving rise to the dispute occurred on reservation lands. The Supreme Court has stated that, as a rule, “considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. Promotion of tribal self-government and self-determination require[ ] that the Tribal Court have the first opportunity to evaluate the factual and legal bases for the challenge to its jurisdiction.”<sup>108</sup>

A similar exhaustion rule has been extended to states in habeas corpus cases and it is also grounded in comity. The Supreme Court, in *Darr v Burford*,<sup>109</sup> noted that when the relevant federal habeas statute<sup>110</sup> gave federal courts jurisdiction to hear state prisoners’ habeas petitions challenging the constitutionality of their detention, it “created an area of potential conflict between

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<sup>106</sup> See *Cassirer II*, 580 F3d at 1062.

<sup>107</sup> *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522, 543 n 27 (1987).

<sup>108</sup> *Iowa Mutual Insurance Co v LaPlante*, 480 US 9, 15–16 (1987) (quotation marks and citation omitted).

<sup>109</sup> 339 US 200 (1950).

<sup>110</sup> 28 USC § 2241.

state and federal courts.”<sup>111</sup> This led to a prudential exhaustion requirement that was later codified in 28 USC § 2254.<sup>112</sup> The Court in *Darr* described the rationale for the exhaustion rule:

[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity [for] the state courts to correct a constitutional violation. . . . Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.<sup>113</sup>

What is important, for our purposes, is that the rationale for this exhaustion requirement is not to promote judicial efficiency, ease congestion, or advance any other consideration that exclusively benefits the federal courts. Rather it is a special regard for the sovereign interests of another government—comity, in a word. This suggests that the exhaustion of local remedies is designed to prevent conflict between sovereigns.

As noted earlier, the Supreme Court has not explicitly required exhaustion of local remedies in foreign countries.<sup>114</sup> The Ninth Circuit, in *Sarei v Rio Tinto PLC*,<sup>115</sup> however, offered a particularly clear explanation of the exhaustion rule in the context of foreign relations law. The court’s explanation confirms that comity is the central reason for the requirement. The court concluded that “invoking exhaustion out of respect for another sovereign, as we do in the case of tribal courts, resonates most forcefully in the international context.”<sup>116</sup> It reasoned that “if exhaustion is considered essential to the smooth operation of international tribunals whose jurisdiction is established only through explicit consent from other sovereigns, then it is all the more significant in the absence of such explicit consent to jurisdiction.”<sup>117</sup> So, as in the

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<sup>111</sup> *Darr*, 339 US at 204.

<sup>112</sup> *Id* at 210–11.

<sup>113</sup> *Id* at 204.

<sup>114</sup> The closest the Court has come to endorsing the prudential rule is this footnoted statement: “We would certainly consider [an exhaustion requirement for ATS suits] in an appropriate case.” *Sosa*, 542 US at 733 n 21.

<sup>115</sup> 550 F3d 822 (9th Cir 2008).

<sup>116</sup> *Id* at 829.

<sup>117</sup> *Id* at 830.

habeas corpus and tribal court contexts, the exhaustion of local remedies in a foreign country is clearly a doctrine of comity.

#### B. Comity and the Intent of the Expropriation Exception

If the exhaustion of local remedies rule is a gesture of comity and Congress intended to withhold comity in takings cases, then the Ninth Circuit's discretionary exhaustion requirement is inappropriate. There is some indication that Congress intended for the courts to withhold comity when a foreign sovereign expropriates property in violation of international law.

One indication is the mere fact that an expropriation exception to sovereign immunity exists at all. The expropriation exception is an anomaly within the general scheme of the FSIA. The FSIA, as noted earlier, was designed to codify the restrictive theory of sovereign immunity, under which a government's public acts are immune from suit while its commercial acts are not.<sup>118</sup> And most of the FSIA exceptions are consistent with this theory. The commercial activity exception is the most obvious example, since it abrogates sovereign immunity when "the action is based upon a *commercial activity* carried on in the United States by the foreign state."<sup>119</sup> Other exceptions likewise involve nonpublic foreign state activity or property within the United States.<sup>120</sup> Expropriations within a sovereign's own territory are, by contrast, quintessential public acts normally immune from suit under the restrictive theory.<sup>121</sup>

The expropriation exception is also an anomaly among the sovereign immunity laws of foreign countries and international law. According to the Fourth Restatement, "[n]o provision comparable to § 1605(a)(3) has yet been adopted in the domestic immunity statutes of other countries."<sup>122</sup> Furthermore, no "international

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<sup>118</sup> See HR Rep No 94-1487 at 7 (cited in note 1) ("[T]he bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts."). See also note 14 and accompanying text.

<sup>119</sup> 28 USC § 1605(a)(2) (emphasis added).

<sup>120</sup> See, for example, 28 USC § 1605(a)(4) (withholding sovereign immunity for cases "in which rights in property in the United States . . . are in issue"); 28 USC § 1605(a)(5) (withholding sovereign immunity when "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States"). See also generally 28 USC § 1605(a).

<sup>121</sup> See Restatement (Fourth) of the Foreign Relations Law of the United States § 455 n 4 ("[E]xpropriations or nationalizations are sovereign (or 'public') rather than commercial acts.").

<sup>122</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 455 n 15.

instrument provide[s] for removal of immunity for alleged violations of international law or *jus cogens*.”<sup>123</sup>

The point here is that because the expropriation exception is so unusual—not inspired by any existing doctrine and not consistent with the restrictive theory—it is a meaningful and deliberate legislative intervention in the ordinary operation of sovereign immunity doctrine. And since considerations of comity are the driving force behind sovereign immunity,<sup>124</sup> the expropriation exception is, by extension, a deliberate intervention in the ordinary operation of comity. By singling out international takings as the only clearly public acts not entitled to immunity, Congress tacitly rejected the application of comity when international takings are alleged.

The second major indication that comity is disfavored in the context of expropriations is the federal legislation passed in the wake of *Banco Nacional de Cuba v Sabbatino*.<sup>125</sup> In *Sabbatino*, President Dwight D. Eisenhower issued an order reducing the quota for sugar imported from Cuba. The government of Cuba retaliated by expropriating the property of certain American-owned companies, including sugar owned by *Compania Azucarera Vertientes-Camaguey de Cuba* (“CAV”), a Cuban company principally owned by US citizens.<sup>126</sup> CAV had contracted to sell that sugar to the defendant, an American commodities broker, before it was expropriated.<sup>127</sup> The defendant ultimately contracted again to purchase the sugar, this time from the Cuban government. But after receiving the shipment, it paid CAV instead of the Cuban government.<sup>128</sup> Cuba brought suit in the Southern District of New York to recover its payment.<sup>129</sup>

The primary question on appeal to the Supreme Court was whether the “act of state” doctrine precluded the defendant from challenging the validity of the expropriation.<sup>130</sup> The act of state doctrine, according to the Court, stands for the following principle:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country

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<sup>123</sup> Restatement (Fourth) of the Foreign Relations Law of the United States § 455 n 15.

<sup>124</sup> *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480, 486 (1983) (“[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States.”).

<sup>125</sup> 376 US 398 (1964).

<sup>126</sup> *Id.* at 401–03.

<sup>127</sup> *Id.* at 401.

<sup>128</sup> *Id.* at 404–06.

<sup>129</sup> *Sabbatino*, 376 US at 406.

<sup>130</sup> *Id.* at 400.



will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>131</sup>

In other words, when the challenged act is an exercise of the foreign state's sovereign authority, that fact alone is a complete defense against liability. This principle, like exhaustion and sovereign immunity, was grounded in "the highest considerations of international comity and expediency."<sup>132</sup> Indeed, the Court insisted that subjecting acts of state to the judgment of domestic courts "would very certainly imperil the amicable relations between governments and vex the peace of nations."<sup>133</sup> The Court thus concluded that the act of state doctrine applied and barred any challenge to Cuba's expropriation of the sugar.<sup>134</sup> In fact, the Court was so wary of judicial interference in foreign relations that it stated it would apply the act of state doctrine even if the State Department criticized the expropriation.<sup>135</sup> The Court feared that any judicial endorsement of such criticism would offend the foreign state.<sup>136</sup>

Aghast at the Court's decision to excuse violations of international law—by a communist country no less—Congress enacted 22 USC § 2370(e)(2), commonly known as the Second Hickenlooper Amendment.<sup>137</sup> It states that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits" when rights in property are asserted based upon a taking by that state "in violation of the principles of international law."<sup>138</sup> This language was specifically designed to overturn the result in *Sabbatino*.<sup>139</sup> The courts have since interpreted the amendment quite narrowly—

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<sup>131</sup> Id at 416 (quotation marks omitted), quoting *Underhill v Hernandez*, 168 US 250, 252 (1897).

<sup>132</sup> *Sabbatino*, 376 US at 417, quoting *Oetjen v Central Leather Co*, 246 US 297, 303–04 (1918).

<sup>133</sup> *Sabbatino*, 376 US at 418 (quotation marks omitted), quoting *Oetjen*, 246 US at 303–04.

<sup>134</sup> *Sabbatino*, 376 US at 439.

<sup>135</sup> Id at 432.

<sup>136</sup> Id.

<sup>137</sup> Foreign Assistance Act of 1964, Pub L No 88-633, 78 Stat 1009, codified as amended at 22 USC § 2370(e)(2). See also Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 Colum L Rev 1907, 1936 (1992) (using the name "Second Hickenlooper Amendment").

<sup>138</sup> 22 USC § 2370(e)(2).

<sup>139</sup> Burley, 92 Colum L Rev at 1936 (cited in note 137).

limiting it, for instance, only to cases in which the property is located in the United States at the time of the litigation.<sup>140</sup> Nonetheless, it is an obvious and deliberate legislative intervention in the ordinary operation of the act of state doctrine—a comity-based affirmative defense. The amendment strongly suggests that the courts should withhold the benefits of comity when foreign governments unlawfully expropriate property within their own territory.

The argument here, to be sure, is not that the FSIA or the Second Hickenlooper Amendment explicitly prohibit the application of the exhaustion rule on a discretionary basis. The argument is, rather, that both statutes evince an intention to subject foreign countries to the jurisdiction of US courts when they expropriate property. The default rule in such expropriation cases would be to dismiss the claim for reasons of comity. These statutes were a deliberate legislative intervention to prevent that outcome. To import a jurisdiction-stripping principle of comity like the exhaustion of local remedies would subvert the intent of Congress. And such subversion is especially inappropriate in the area of foreign affairs, as it is traditionally considered the exclusive province of the political branches.<sup>141</sup>

### C. Discretionary Exhaustion Without Comity

The Ninth Circuit frames comity as just one among an indefinite list of equitable considerations that could guide the court's discretion in an exhaustion inquiry.<sup>142</sup> So perhaps the discretionary exhaustion rule could be salvaged by simply excluding comity from consideration. The problem is, however, that the principle of comity is undoubtedly at the core of the exhaustion rule, as has been demonstrated. There is no history of requiring the exhaustion of local remedies except as an effort to avoid conflict and respect the sovereignty of a foreign power.

A discretionary exhaustion rule without the consideration of comity or sovereignty is, in any case, so similar to *forum non conveniens* that it would be duplicative and unnecessary. Consider the Ninth Circuit's remaining prudential factors after comity is excluded: "The existence or lack of a significant United States

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<sup>140</sup> *Id.* at 1937 n 108.

<sup>141</sup> Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617, 1620 (1997) (noting that under the conventional view, the foreign relations power is "presumptively lodged in the federal political branches").

<sup>142</sup> *Cassirer II*, 580 F3d at 1063–64.

‘nexus,’” “the nature of the allegations and the gravity of the potential violations of international law,” and “whether the allegations implicate matters of ‘universal concern’ for which a state has jurisdiction to adjudicate the claims without regard to territoriality or the nationality of the parties.”<sup>143</sup> The absence of a significant US nexus bears on the ease and convenience of litigating the matter in a US court. The absence of serious international law violations or “matters of universal concern” bears on the public interest in adjudicating the dispute in the United States. These factors of private convenience and public interest could be integrated into any forum non conveniens analysis.<sup>144</sup>

#### IV. NO EXHAUSTION

It follows that courts should not require plaintiffs to exhaust local remedies before filing suit under the FSIA expropriation exception. This conclusion is in partial agreement with the position of the DC Circuit. But that court’s suggestion that the FSIA conclusively preempts exhaustion goes too far. This Part demonstrates that the DC Circuit’s view is mistaken as a matter of statutory interpretation. The FSIA does not divest courts of the power to mandate that plaintiffs exhaust local remedies.

Recall that the DC Circuit in *Philipp I* concluded that because the FSIA was enacted as a comprehensive statement of the rules governing sovereign immunity, it foreclosed any extratextual restrictions on jurisdiction.<sup>145</sup> The defendant, Germany, had argued that the statute did not preclude the exhaustion requirement because it is a nonjurisdictional doctrine of the federal common law.<sup>146</sup> But the court dismissed this contention on two grounds. The first was that, elsewhere in the statute, the terrorism exception explicitly requires that foreign state defendants be given an opportunity to arbitrate disputes. The inclusion of such a courtesy in that provision led the court to presume that the omission of exhaustion in the expropriation exception was intentional.<sup>147</sup> The second was that § 1606 of the FSIA “permits only defenses, such as forum non conveniens, that are equally

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<sup>143</sup> *Id.*

<sup>144</sup> For a description of the forum non conveniens factors, see *Gulf Oil Corp v Gilbert*, 330 US 501, 508–09 (1947).

<sup>145</sup> See notes 41–46 and accompanying text.

<sup>146</sup> See *Philipp I*, 894 F3d at 415.

<sup>147</sup> *Id.* at 415–16.

available to private individuals. Obviously a private individual cannot invoke a *sovereign's* right to resolve disputes against it.”<sup>148</sup>

The first argument is flawed because the terrorism exception was enacted as an amendment to the FSIA in 1996, twenty years after the expropriation exception (and the rest of the statute) was drafted.<sup>149</sup> The unstated premise of the court's argument is that Congress contemplated (and hence tacitly rejected) the possibility of allowing foreign states to resolve FSIA disputes themselves. But the only evidence of such contemplation comes from a Congress that neither drafted nor enacted the expropriation exception. The error here is an anachronistic inference of intent. We cannot infer anything about what an earlier Congress intended, considered, or tacitly rejected from what a later Congress enacted because the legislators are not the same. The arbitration requirement in the terrorism exception thus tells us very little about whether Congress intended to withhold the exhaustion requirement in cases falling under the expropriation exception.

The second argument, meanwhile, has no basis in the legislative history or the plain text of § 1606. That provision states that the foreign state “shall be liable in the same manner and to the same extent as a private individual under like circumstances.”<sup>150</sup> This is a statement confirming that when jurisdiction is available under the statute, foreign states will not receive a special dispensation from liability.<sup>151</sup> The provision does not suggest that the state enjoys only those procedural defenses available to private individuals. Indeed, § 1606 itself and a portion of the Report of the House of Representatives explaining § 1606 make clear that foreign states are still immune from punitive damages (even though private defendants are not immune).<sup>152</sup> So that provision does not require the kind of equality between foreign states and individuals suggested by the DC Circuit. This means that Germany's original argument stands un rebutted. Even though the FSIA comprehensively addresses sovereign immunity, nonjurisdictional doctrines of federal common law, like exhaustion, are

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<sup>148</sup> Id at 416 (quotation marks, alteration, and citation omitted) (emphasis in original).

<sup>149</sup> Ilana Arnowitz Drescher, Note, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 NYU J Legis & Pub Pol 791, 801 (2012).

<sup>150</sup> 28 USC § 1606.

<sup>151</sup> See HR Rep No 94-1487 at 22 (cited in note 1) (“Section 1606 makes clear that *if* the foreign state . . . is not entitled to immunity from jurisdiction, *liability* exists as it would for a private party under like circumstances.”) (emphasis added).

<sup>152</sup> See id; 28 USC § 1606.

still applicable. The only question is under what circumstances it would be appropriate for the court to require exhaustion. And here, the court should consider deferring to the executive branch.

## V. RETURNING TO A SYSTEM OF DEFERENCE

This Part proposes that courts should require exhaustion when the president expressly requests it. The foregoing arguments have shown that the authority for an exhaustion rule could not rest solely on the dictates of international law and would not be appropriate as an exercise of judicial discretion. However, such a rule could be justified with the permission of the executive as part of the administration of her foreign relations policy.

### A. Deference on the Basis of Executive Foreign Affairs Powers

Deference to the president on the question of exhaustion is appropriate because courts have recognized a special need for the nation to “speak with one voice” in foreign affairs.<sup>153</sup> And that voice is usually the president’s. Perhaps the strongest statement of this principle comes from *United States v Curtiss-Wright Export Corp.*<sup>154</sup> There, Congress had passed a law empowering the president to prohibit the sale of arms to Bolivia and Paraguay if he thought it would lead to a cessation of hostilities between the two countries. In 1934, President Franklin D. Roosevelt did precisely that, and the Curtiss-Wright Export Corporation was indicted for conspiring to sell arms to Bolivia.<sup>155</sup> Curtiss-Wright alleged that the law was an unconstitutional delegation of legislative power.<sup>156</sup> But the Court ultimately concluded that the power to restrict the sale of arms to foreign belligerents was inherent in national sovereignty and need not come from any specific constitutional grant.<sup>157</sup> It concluded, further, that the president may exercise such inherent powers in the field of “external affairs” because “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>158</sup> The Court noted that the president “has the better opportunity of knowing the conditions which prevail in foreign

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<sup>153</sup> *Crosby v National Foreign Trade Council*, 530 US 363, 381 (2000).

<sup>154</sup> 299 US 304 (1936).

<sup>155</sup> *Id.* at 311–13.

<sup>156</sup> *Id.* at 314.

<sup>157</sup> *Id.* at 318.

<sup>158</sup> *Curtiss-Wright*, 299 US at 319.

countries. . . . He has his confidential sources of information.”<sup>159</sup> He is more capable of acting with “caution and secrecy,” which are necessary for the success of diplomatic negotiations.<sup>160</sup>

To be sure, this strain of executive power maximalism in foreign affairs has been roundly criticized by commentators for several decades.<sup>161</sup> And the Supreme Court has repudiated the dictum from *Curtiss-Wright* that the president is the nation’s “sole organ” in international affairs—at least insofar as it implies that the president has an “unbounded power” over the nation’s foreign policy.<sup>162</sup> However, the broader principle that the nation should “speak with one voice” in foreign affairs and that the president is uniquely suited to provide that voice is still valid.<sup>163</sup> The Supreme Court continues to acknowledge that “[t]he President does have a unique role in communicating with foreign governments,” and that “only the Executive has the characteristic of unity at all times” necessary in diplomacy.<sup>164</sup>

There is no reason why these functional considerations would not apply if the president were to recommend the application of the exhaustion of local remedies rule in a given case. The exhaustion rule, like other doctrines of comity within the foreign relations common law, is designed to prevent the courts from aggravating the relationship between the United States and other nations.<sup>165</sup> But the president and the State Department are probably in the best position to know when a lawsuit might jeopardize the country’s foreign relations or interfere with the administration’s foreign policy objectives.

Furthermore, the courts can require plaintiffs to utilize the judicial system of a foreign government only if that government

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<sup>159</sup> Id at 320.

<sup>160</sup> Id at 320–21.

<sup>161</sup> See Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J L & Polit 1, 39 n 139 (2000) (collecting sources).

<sup>162</sup> See *Zivotofsky v Kerry*, 135 S Ct 2076, 2089 (2015) (“[T]he Secretary quotes *United States v. Curtiss-Wright Export Corp.*, which described the President as ‘the sole organ of the federal government in the field of international relations.’ This Court declines to acknowledge that unbounded power.”) (citation omitted).

<sup>163</sup> See, for example, *American Insurance Association v Garamendi*, 539 US 396, 424–25 (2002) (invalidating a California statute because it “compromises the very capacity of the President to speak for the Nation with one voice in dealing with other governments to resolve claims . . . arising out of World War II”) (quotation marks omitted); *Zivotofsky*, 135 S Ct at 2086 (“Recognition is a topic on which the Nation must speak . . . with one voice.”) (quotation marks omitted).

<sup>164</sup> *Zivotofsky*, 135 S Ct at 2090, 2086.

<sup>165</sup> See Part III.A.

has been recognized by the United States.<sup>166</sup> The Supreme Court held in *Zivotofsky v Kerry*<sup>167</sup> that the president holds the exclusive power of recognition—which includes the power to determine when the United States will regard a foreign government as having sovereign authority over a territory.<sup>168</sup> This power was implied from the fact that the president alone has the constitutional authority to negotiate treaties, receive ambassadors, and dispatch diplomatic agents—actions which effect recognition under international law.<sup>169</sup> The Court channeled some of the maximalist rhetoric from *Curtiss-Wright*, affirming the president’s unique role in recognizing foreign sovereigns and conducting American diplomacy:

Recognition is a topic on which the Nation must speak with one voice. That voice must be the President’s. . . . [O]nly the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, decision, activity, secrecy, and dispatch. The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition.<sup>170</sup>

Because the exhaustion requirement, as a privilege of sovereignty, depends on the recognition of the sovereign, the president should surely have a say in determining when it applies.

It remains only to determine what the nature and scope of the president’s authority should be in such a system. Deference in the context of foreign affairs, as one legal scholar notes, “can mean a variety of propositions, ranging from the weight given to an argument based on its persuasive power, to acceptance of the executive branch’s views of international facts, to judicial abstention under the political question doctrine.”<sup>171</sup> Deference, here,

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<sup>166</sup> See *National City Bank of New York v Republic of China*, 348 US 356, 358 (1955) (“[T]he Republic [of China] and its governmental agencies enjoy a foreign sovereign’s immunities to the same extent as any other country duly recognized by the United States.”). Further, the Restatement (Third) of the Foreign Relations Law of the United States defines recognition of a government as “formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.” Restatement (Third) of the Foreign Relations Law of the United States § 203 cmt a.

<sup>167</sup> 135 S Ct 2076 (2015).

<sup>168</sup> See id at 2094 (“[T]he power to recognize foreign states resides in the President alone.”).

<sup>169</sup> See id at 2085–86.

<sup>170</sup> Id at 2086 (quotation marks, citations, and alterations omitted).

<sup>171</sup> Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 Va L Rev 649, 651 (2000).

should mean that where representatives of the executive branch explicitly recommend that a court force an FSIA takings plaintiff to exhaust local remedies, that recommendation should be a strongly persuasive (but ultimately nonbinding) consideration in the judge's decision to impose the requirement.<sup>172</sup> Since the basis for the deference is to ensure consistency with US foreign policy, the executive would also have to determine that applying the exhaustion rule would advance the national interest or foreign policy objectives of the United States. This would require a detailed description of the factual circumstances warranting an application of the exhaustion rule, including the foreign policy interest at stake and the effect of the litigation on the nation's relationship with the defendant state. A scholarly brief merely interpreting the FSIA and opining on the intent of the statute would not be entitled to deference, as statutory interpretation is well within the core competency of the courts.

This would be similar to the kind of deference the courts have accorded the executive branch in other contexts. For example, during the Cold War, the Justice and State Departments determined on a case-by-case basis whether unrecognized governments had standing to sue in the United States, and courts generally deferred to their recommendations.<sup>173</sup> Additionally, although the Second Hickenlooper Amendment generally prohibits application of the act of state doctrine in cases of unlawful expropriation, it contains an exception for presidential authorization. It states that the courts may apply the act of state doctrine if "the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."<sup>174</sup>

Courts have also recognized a so-called "Bernstein exception" to the act of state doctrine that similarly promotes a case-by-case deference to the executive. Some courts, following this exception, will refrain from applying the act of state doctrine if the State Department submits a letter stating that judicial review of an act of

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<sup>172</sup> This would be subject to the limitations internal to the exhaustion doctrine. There is, for example, no obligation to exhaust illusory remedies. The president's request that exhaustion be applied would require the court to at least perform the exhaustion analysis, but it may not ultimately succeed in staying or dismissing the case.

<sup>173</sup> See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Cal L Rev 671, 711–12 (1998) (noting an increase in judicial reliance on the executive in its recognition of foreign governments and their laws).

<sup>174</sup> 22 USC § 2370(e)(2).



state would not damage the nation's foreign relations.<sup>175</sup> The earliest instance of this kind of deference comes from the eponymous *Bernstein v N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*.<sup>176</sup> The plaintiff in that case, a Jewish business owner, alleged that Nazi officials forced him to transfer his shares in the business to a third party. That party, in turn, transferred the shares to the defendant. The court had ruled, in an earlier attempt by the plaintiff to obtain relief, that “[it] would not pass upon charges of wrongful conduct by officials of a foreign state.”<sup>177</sup> And so the plaintiff eventually obtained a letter from the acting legal adviser of the State Department which declared that “[t]he policy of the Executive . . . is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”<sup>178</sup> The Second Circuit deferred to this statement of executive policy: “In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question.”<sup>179</sup> The Supreme Court has never formally endorsed this exception, and some justices have cast doubt on its validity,<sup>180</sup> but other justices have expressed their approval in principle.<sup>181</sup>

Certainly, the Bernstein exception is not without controversy, and the concerns it raises could also arise with a deference-based exhaustion requirement. For example, one commentator has noted that the Bernstein exception might force courts to treat similarly situated parties unequally, resulting in unpredictable and inconsistent case law. It also strips courts, to a modest

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<sup>175</sup> Breana Frankel, Oy Vey! *The Bernstein Exception: Rethinking the Doctrine in the Wake of Constitutional Abuses, Corporate Malfeasance, and the ‘War on Terror’*, 41 *Geo Wash Intl L Rev* 67, 71, 87–88 (2009).

<sup>176</sup> 210 F2d 375 (2d Cir 1954).

<sup>177</sup> *Bernstein v N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F2d 71, 73 (2d Cir 1949) (describing this earlier iteration of the case).

<sup>178</sup> *Bernstein*, 210 F2d at 376.

<sup>179</sup> *Id.*

<sup>180</sup> See *First National City Bank v Banco Nacional de Cuba*, 406 US 759, 790 (1972) (Brennan dissenting, joined by Blackmun, Marshall, and Stewart) (citations omitted):

The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court. The “*Bernstein*” exception relinquishes the function to the Executive by requiring blind adherence to its requests that foreign acts of state be reviewed. Conversely, it politicizes the judiciary.

<sup>181</sup> See *id.* at 768 (Rehnquist) (plurality) (“[W]e of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine.”).

degree, of their independence and discretion.<sup>182</sup> Instead of deciding for themselves whether the act of state doctrine applies, courts essentially outsource this judgment to the executive branch. This could be perceived as an abdication of the judicial responsibility to “say what the law is.”<sup>183</sup>

But these effects are not as significant as they appear. As then-Justice William Rehnquist noted in *First National City Bank v Banco Nacional de Cuba*,<sup>184</sup> “[t]he act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government.”<sup>185</sup> Thus a statement from the Executive Branch that the court would not harm the national interest by reviewing an act of state would obviate the doctrine.<sup>186</sup> The principle underlying this conclusion comes from the “classical common-law maxim that ‘the reason of the law ceasing, the law itself also ceases.’”<sup>187</sup> In other words, a central purpose of the very doctrine at issue is to avoid interference with the foreign policy of the political branches—precisely the opposite of asserting independent judicial authority. So the concern for judicial independence seems misplaced. Moreover, if the act of state doctrine is applied in a highly variable manner, this is just a necessary consequence of ensuring that the doctrine is applied only where the circumstances are such that it would serve its purpose. Exhaustion of local remedies, a cognate doctrine of comity serving a similar function, may be justified on similar grounds.

Finally, the Supreme Court has signaled that deference to the executive branch might be appropriate when it intervenes on a case-by-case basis to express an opinion on whether the court should exercise jurisdiction under the FSIA. In *Republic of Austria v Altmann*,<sup>188</sup> the US government submitted an amicus brief recommending that courts should not apply the FSIA to expropriations and other conduct by foreign states that occurred before the statute was enacted. The Court ultimately rejected this recommendation, noting that it “concerns interpretation of the

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<sup>182</sup> See Frankel, 41 *Geo Wash Intl L Rev* at 95–98 (cited in note 175).

<sup>183</sup> *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) (declaring, famously, that “[i]t is emphatically the province and duty of the judicial department to say what the law is”).

<sup>184</sup> 406 US 759 (1972).

<sup>185</sup> *Id.* at 767–68 (Rehnquist) (plurality).

<sup>186</sup> *Id.* at 768.

<sup>187</sup> *Id.*, quoting *Black’s Law Dictionary* 288 (West 4th ed 1951).

<sup>188</sup> 541 US 677 (2004).

FSIA's reach—a pure question of statutory construction well within the province of the Judiciary.”<sup>189</sup> However, it went on to note that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”<sup>190</sup> The Court added that it “express[es] no opinion on the question whether such deference should be granted in cases covered by the FSIA.”<sup>191</sup> While not a definitive endorsement of deference, this suggests that, in the Court's view, deference on a case-by-case basis could be justified and is not obviously prohibited by the FSIA.

In sum, courts should be willing to defer to the president's recommendation of the exhaustion rule on a case-by-case basis. First, such deference is appropriate, as a practical matter, because the president is best positioned to know when the immediate exercise of jurisdiction will vex the comity of nations. Second, only the president has the power to recognize a foreign government as sovereign, and such recognition is a necessary condition for such courtesies as the exhaustion of local remedies. Third, courts have, in the past, deferred to the executive's judgment on similar questions involving foreign relations. And finally, this position is consonant with the dictum in *Altmann* that deference to the executive “might well” be appropriate in some matters involving international relations.

#### B. Exhaustion Without Congressional Authorization

Implementing this deference framework may raise thorny separation of powers concerns. Nothing within the language of the FSIA expropriation exception explicitly authorizes or prohibits the president from recommending the exhaustion requirement in a given case. But such a recommendation would be, no doubt, in tension with the central object of the provision—subjecting foreign states to the jurisdiction of US courts when they expropriate property. Thus, if the president recommends that a court dismiss an FSIA suit or stay proceedings on the ground that the plaintiff has not exhausted local remedies, this could potentially place the executive at variance with Congress.

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<sup>189</sup> *Id.* at 701 (quotation marks and alteration omitted).

<sup>190</sup> *Id.* at 702 (citation omitted) (emphasis in original).

<sup>191</sup> *Id.*

The seminal case for reviewing executive action under such circumstances is *Youngstown Sheet & Tube Co v Sawyer*.<sup>192</sup> The case was precipitated by a labor dispute in the steel industry; the union representing steel workers threatened a strike in order to secure favorable terms on their collective bargaining agreement. President Harry S. Truman, fearing that a disruption in the supply of steel would threaten national security, ordered the secretary of commerce to seize control of the steel mills. The steel companies subsequently filed suit seeking declaratory and injunctive relief.<sup>193</sup> Justice Hugo Black, writing for the majority, ultimately concluded that no statute or provision of the Constitution authorized the seizure.<sup>194</sup>

But the case's most enduring legacy is Justice Robert Jackson's concurrence, in which he laid out a three-part schema for reviewing the constitutionality of presidential acts. First, where Congress authorizes presidential action, presidential power is at its maximum and the action is presumed valid.<sup>195</sup> Second, where Congress has neither granted nor denied the authority to act, the president must rely on his own independent authority.<sup>196</sup> The validity of the act becomes a fact-sensitive inquiry that varies from case to case depending on "the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>197</sup> Finally, where the president acts contrary to a congressional directive, the act is valid only if the president's power is exclusive and the congressional directive is unconstitutional.<sup>198</sup> The Court formally endorsed this framework in *Dames & Moore v Regan*,<sup>199</sup> but with the qualification that the analysis is best applied as a continuum (rather than a set of discrete categories) ranging from express congressional approval to express disapproval.<sup>200</sup>

A critic of the proposal advanced in this Comment could argue that the president does not have the authority to request exhaustion under this *Youngstown* framework. Such a critic would

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<sup>192</sup> 343 US 579 (1952).

<sup>193</sup> Id at 582–83.

<sup>194</sup> See id at 588–89.

<sup>195</sup> Id at 635–37 (Jackson concurring).

<sup>196</sup> *Youngstown*, 343 US at 637 (Jackson concurring).

<sup>197</sup> See id.

<sup>198</sup> See id at 637–38.

<sup>199</sup> 453 US 654 (1981).

<sup>200</sup> Id at 669 ("[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.").

point out that although the FSIA neither explicitly authorizes nor prohibits the president from determining when exhaustion applies, Congress's intent to convert sovereign immunity into a judicial determination free of political influence is clear.<sup>201</sup> Congress's hostility to the application of comity in cases of international expropriation is also evident.<sup>202</sup> For this reason, a statement from the executive determining that the plaintiff should exhaust local remedies would likely fall somewhere between *Youngstown* category two (congressional silence) and category three (congressional prohibition). This means that the president would have to rely on his independent authority under Article II of the Constitution. And, of course, no provision of Article II empowers the president to dictate when a doctrine of federal common law, like exhaustion, must be applied.<sup>203</sup>

But this critique misconceives the proposal advanced in this Comment. The proposal only permits the president to make a recommendation—not a binding determination—that exhaustion applies. It is the court that ultimately imposes (or declines to impose) the exhaustion requirement. Because the president's recommendation is purely precatory, the *Youngstown* analysis does not apply. The president's recommendation does not conflict with Congress in a way that falls outside his constitutional power.

### C. Additional Considerations

The drafters of the FSIA aimed to free the determination of sovereign immunity from the caprice of executive policy—replacing a variable and ad hoc application of the doctrine with a predictable statutory scheme.<sup>204</sup> And so a practice of deferring to the executive branch seems regressive and undesirable. But that concern overstates the problem. The imposition of an exhaustion requirement, under this proposal, is not left to the president's

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<sup>201</sup> See Part I.A.

<sup>202</sup> See Part III.B.

<sup>203</sup> The Constitution gives the president certain defined foreign affairs powers, including the powers to receive and appoint ambassadors and make treaties. See US Const Art II, § 2, cl 2; US Const Art II, § 3. But it does not grant him such plenary authority over foreign affairs as to justify making binding determinations about when plaintiffs must exhaust local remedies. See note 162 and accompanying text.

<sup>204</sup> See HR Rep No 94-1487 at 7 (cited in note 1) (stating that one purpose of the FSIA is to “transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process”).

unfettered discretion. Plaintiffs can avoid the exhaustion requirement “by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.”<sup>205</sup> This could even include when the plaintiff’s claims are barred by the statute of limitations in the foreign state.<sup>206</sup> These internal limitations on the exhaustion rule ensure that plaintiffs, in some cases, will have access to US courts notwithstanding the executive’s recommendation.

Furthermore, this proposal grants the executive a substantially more limited role in the jurisdictional inquiry than it had under the pre-FSIA regime. First, it applies only to the expropriation exception and not the other jurisdiction-granting provisions of the statute. Second, it applies only to the application of the exhaustion rule and not the entire determination of sovereign immunity. The president is not able to make a deference-worthy recommendation as to which countries are immune from suit and which are not (like in the past). The courts decide that question. The president can only make a recommendation regarding whether to force a plaintiff to exhaust local remedies. Third, the executive must still determine that the exhaustion rule would advance the national interest or foreign policy objectives of the United States in a particular case. And so the recommendation could not be based on caprice, pretext, or legal opinions having little to do with foreign policy or any other compelling national interest. A court that is not persuaded that the president’s request rests on a legitimate policy concern would be free to deny that request and hear the case without requiring the plaintiff to exhaust local remedies.

#### CONCLUSION

Thus, the authority to mandate that an FSIA takings plaintiff exhaust local remedies cannot come from customary international law. Indeed, the exhaustion rule, as stated in international law, does not apply in the domestic context, it might not be operable in US courts without statutory authorization, and it could generate a preclusion trap. Nor should it be applied as a matter of judicial discretion, as this would conflict with congressional

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<sup>205</sup> *Cassirer II*, 580 F3d at 1063 (quotation marks omitted), quoting *Sarei*, 550 F3d at 832.

<sup>206</sup> See, for example, *Chang v Baxter Healthcare Corp*, 599 F3d 728, 736 (7th Cir 2010) (“[T]he cases suggest that if the plaintiff’s suit would be time-barred in the alternative forum, his remedy there is inadequate—is no remedy at all, in a practical sense.”).

intent in the area of foreign policy. Instead, the sole basis for ever requiring exhaustion to sue under the expropriation exception should be the recommendation of the executive. This position, it is important to note, is not premised on an inflexible separation-of-powers formalism. It does not imply that any judicial interference with the foreign policy of the political branches is impermissible. Nor does it imply that the authority of the executive recommendation is binding. The position implies only that in this narrow circumstance, where the FSIA neither authorizes nor explicitly prohibits an exhaustion requirement, the decision to apply it should rest on the approval of a political branch. That approval does not come from Congress, given the general intent of the expropriation exception. But it may come, independently, from the executive. And such deference to the executive would be constitutionally appropriate and advantageous because of the president's unique authority in the realm of foreign affairs.