THE TRAGEDY OF INTERNATIONAL COMITY: HOW DISCRETION CAUSED THE DEATH OF FOREIGN IMMUNITY

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ABSTRACT

This article examines the concept of "international comity" – affording deference to a foreign nation in actions where that nation has an interest in its resolution in order to promote durable international relations–and whether or not this concept has been effective and consistent in nurturing foreign relationships. The article then brings light to the Foreign Sovereign Immunities Act of 1976 (FSIA) and the manner in which it operates with, or perhaps hinders, the doctrine of 'international comity'. After the article addresses different public policy perspectives among the varying approaches to international comity, the final part addresses the complexities surrounding a proposed, two-part legislative action. This analysis finally leads to the conclusion that the doctrine of international comity is ultimately unsuccessful in ensuring the strong foreign associations it set out to create because of the exorbitant layers of ambiguity obscuring its purpose and the wide range of discretion afforded to courts. The article argues the best way to restore focus on the doctrine's original purpose is through Congressional action.

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INTRODUCTION

"In a century strewn with international upheaval, cataclysmic violence and untold bloodshed, the Holocaust—the Nazis' premeditated murder of six million innocent Jewish men, women, and children during World War II—dwells in a dreadful dimension of its own."[1] Without a doubt, the atrocities the Nazi regime committed throughout the early twentieth century constituted one of the most devastating events in the history of the world.[2] Today, the repercussions of those actions echo throughout society worldwide.[3] World War II painted some of the most horrific pictures of our past.[4] The massive death toll was targeted, systematic, and persistent. The shameful theft of property from an entire people just before transporting them to their slaughter—or even from their lifeless bodies—left a scar that will never fade.[5] The question that presents itself now, over seven decades later, is how to deal with the devastation that this world-altering event left behind. Is it an American responsibility? Should it be? Or should it be left to the very institutions that caused the damage—albeit under a different regime?

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[1] Complaint, Simon v. Republic of Hungary, No. 1:10-cv-01770-BAH, Document 118 (filed June 13, 2016) (the "Simon Cmpl.").

[2] *See, e.g.*, Madison Horne, *Holocaust Photos Reveal Horrors of Nazi Concentration Camps*, A&E NETWORK, https://www.history.com/news/holocaust-concentration-camps-photos; Michael E. Ruane, *Nazi War Crimes Evidence Comes to the Holocaust Museum in Washington*, THE WASHINGTON POST (Nov. 13, 2019,6:30 AM), https://www.washingtonpost.com/history/2019/11/13/nazi-war-crimes-evidence-comes-holocaust-museum-washington/; Task Force for International Cooperation on Holocaust Education, Remembrance and Research, *2010 Education Working Group Paper on the Holocaust and Other Genocides*, UNITED NATIONS, https://www.un.org/en/holocaustremembrance/EM/partners%20materials/EWG_Holocaust_and_Other_Genocides.pdf; *The Holocaust*, THE NATIONAL WWII MUSEUM, https://www.nationalww2museum.org/war/articles/holocaust.

[3] *See generally* Becka A. Alper, *70 Years After WWII, the Holocaust is Still Very Important to American Jews*, PEW RESEARCH CENTER (Aug. 13, 2015), https://www.pewresearch.org/fact-tank/2015/08/13/70-years-after-wwii-the-holocaust-is-still-very-important-to-american-jews/; *See also* Evgeny Finkel & Volha Charnysh, *Property Stolen During the Holocaust Made Some Communities Richer, Even 70 Years Later*, THE WASHINGTON POST (Aug. 8, 2017, 7:00 AM) (explaining how Nazi officers forcibly collected golden dental work from the bodies of Jews they had gassed); Todd Grabarsky, *Comity of Errors: The Overemphasis of Plaintiff Citizenship in Foreign Sovereign Immunities Act "Takings Exception" Jurisprudence*, 33 CARDOZO L. REV. 237, 240 (2011) (discussing how an entire shipping business was stolen by the Nazis).

[4] *See* Ruane, *supra* note 2.

[5] Finkel & Charnysh, *supra* note 3; *See also* Lewi Stone, *Quantifying the Holocaust: Hyperintense Kill Rates During the Nazi Genocide*, 5 AM. J. OF SCIENCE ADVANCES 1 (2019) (putting the death toll of the Holocaust between 5.4 and 5.8 million).

In the United States, the expropriation[6] of property by the government, although rare, is justified in the interest of general welfare, where it is limited to necessity and compensated fairly.[7] The Nazi regime did not share this rule of law.[8] Instead, a political approach to confiscating property disallowed anyone from an undesirable class, religious upbringing, or racial background from owning real property.[9] And, that was not the end of the unrighteous misappropriation of property. Even chattel property, *i.e.*, personal property,[10] was "confiscated" by government agents and quasi-military regimes and became "loot" for those parties to liquidate and use for their own interests.[11]

The Jewish people indisputably continue to feel the effects of their early repression and, as the world attempts to make progress, litigation is still stuck in the past.[12] The stories are endless,[13] and disputes continue to pack courts across the United States as Holocaust survivors and their heirs attempt to regain property. [14] Through this litigation, a major issue has presented itself—namely, whether the United States judicial system should be adjudicating World War II era foreign takings cases, or whether such cases are more suitable to a foreign forum.[15]

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[6] Expropriation is "[a] governmental taking or modification of an individual's property rights[.]" *Expropriation*, Black's Law Dictionary (11th ed. 2019).
[7] *See generally* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1 (1995).
[8] Arthur Schweitzer, *Big Business and Private Property Under the Nazis*, 19 THE JOURNAL OF BUSINESS OF THE UNIVERSITY OF CHICAGO 99, 102-103 (1946).
[9] *Id*.
[10] A chattel is defined as a "[m]ovable or transferable property, personal property; [especially] a physical object capable of manual delivery and not the subject matter of real property." *Chattel*, Black's Law Dictionary (11th ed. 2019).
[11] Schweitzer, *supra* note 8.
[12] *See, e.g.*, Simon v. Republic of Hungary, 443 F. Supp. 3d 88 (D.D.C. 2020); Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018); de Csepel v. Republic of Hungary, 169 F. Supp. 3d 143 (D.D.C. 2016); Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015); Abelesz v. Erste Grp. Bank AG, 695 F.3d 655 (7th Cir. 2012); In re Holocaust Victim Assets Litigation, 731 F. Supp. 2d 279 (E.D.N.Y. 2010).
[13] *See, e.g.*, Sarah Chemla, *Holocaust Survivors Share Stories of Stolen Property in New Campaign*, THE JERUSALEM POST (Sept. 7, 2020, 1:25 PM), https://www.jpost.com/diaspora/holocaust-survivors-and-heirs-tell-stolen-property-stories-on-social-media-641337; Thérèse O'Donnel, *The Restitution of Holocaust Looted Art Transitional Justice: The Perfect Storm or the Raft of Medusa?*, 22 E.J.I.L. 49 (2001); *#MyPropertyStory*, WORLD JEWISH RESTITUTION ORGANIZATION, https://wjro.org.il/my-property-story/; Greg Bradsher, *Turning History Into Justice: Holocaust-Era Assets Records, Research, and Restitution*, NATIONAL ARCHIVES (Apr. 19, 2001), https://www.archives.gov/research/holocaust/articles-and-papers/turning-history-into-justice.html.
[14] *See* Simon, 443 F. Supp. 3d at 88; Reif v. Nagy, 175 A.D.3d 107 (N.Y. App. Div. 2019).
[15] *See* Simon, 443 F. Supp. 3d at 88; Philipp, 894 F.3d at 406*; Fischer*, 777 F.3d at 847.

Particularly where litigants are seeking multi-billion-dollar relief which could cripple entire nations, the implications of these cases are vast and consequential.[16] What, then, decides whether the United States should step into these disputes or leave it to the very countries who committed these atrocities and are now attempting to rectify them?

The United States has struggled to find the perfect balance between foreign relations and domestic adjudication throughout history.[17] Doctrines that attempt to reconcile the American judiciary with foreign legal systems are more or less "manifestations of international comity."[18] A "gesture of comity" is the Supreme Court's characterization of deference to a foreign sovereign[19] that has become quite contentious for its application in limiting the reach of American courts.[20] Particularly in cases involving Nazi-related property appropriation, courts across the country have debated whether international comity—a doctrine that gives courts the right to decline jurisdiction in favor of a foreign government who has an interest in resolving the matter on its own—is an appropriate form of abstention, deferring cases to seek remedy in foreign forums.[21] In fact, it is partially the misconception that international comity is a doctrine of international law that makes it so difficult to articulate, and the Supreme Court has thus far been absent in clarifying its

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[16] Yaakov Schwartz, *DC Court Says Holocaust Survivors Can Sue Hungary in the US for Huge Reparations*, THE TIMES OF ISRAEL (Jan. 16, 2019, 4:05 PM), https://www.timesofisrael.com/dc-court-says-holocaust-survivors-can-sue-hungary-in-the-us-for-huge-reparations/#gs.fzbb5s.

[17] *Compare* Mujica v. AirScan, Inc., 771 F.3d 580, 598 (9th Cir. 2014) (labeling international comity as a doctrine of "prudential abstention"); JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418 (2d Cir. 2005) (same); Goss Intern. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355 (8th Cir. 2007) (requiring abstention where Japan had a substantial interest to determine the applicability of the Special Measures Law) *with* GDG Acquisitions, LLC v. Government of Belize, 749 F.3d 1024, 1034 (11th Cir. 2014) (denying discretionary application of international comity except in "exceptional" circumstances); United States v. Sum of $70,990,605, 991 F. Supp. 2d 154, 170-171 (D.D.C. 2013) (same).

[18] William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2072 (2015).

[19] Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004) (*citing* Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).

[20] Dodge, *supra* note 18, at 2072.

[21] *See* Simon v. Republic of Hungary, 911 F.3d 1172 (D.C. Cir. 2018) (reversing the District Court's decision to abstain from exercising jurisdiction over claims of Jewish who allege property theft against the Hungary and related defendants); Fischer v. Magyar Államvasutak Zrt, 892 F.3d 915 (7th Cir. 2018) (affirming a ruling by the District Court to abstain from exercising subject matter jurisdiction over the claims until the plaintiffs had exhausted their remedies in Hungary); Dodge, *supra* note 18, at 2073.

execution.[22] Indeed, the issue has become so great that it seemed the Supreme Court could no longer ignore it—the Court granted certiorari on the issue of international comity in July of 2020 in both *Hungary v. Simon* and *Philipp v. Germany*.[23] But rather than facing the issue head-on and providing guidance for future use of comity, the Court remanded those cases on other grounds.[24]

As courts scramble to find uniform answers to the application of international comity—especially in circumstances where other domestic law may apply—Congress sits idly by. At its inception, the United States sought to make strong international bonds, starting with the French Alliance.[25] Over the next two centuries, as an emerging power, the U.S. began to create connections overseas, and the idea of foreign sovereign immunity was born, protecting foreign countries from being sued directly in the U.S.[26] Generally, the U.S. afforded all foreign countries with which it had an established relationship, comprehensive immunity from suit.[27] The executive branch retained discretion but had no set rules dictating when and when not to apply this immunity, so Congress passed the Foreign Sovereign Immunities Act of 1976 (FSIA).[28] The purpose behind the FSIA was to lay out a structured framework for applying foreign sovereign immunity while leaving the remaining discretion to the courts rather than the executive.[29] Despite Congress' attempt, litigation today has shown that the FSIA is not the clear set of

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[22] Dodge, *supra* note 18, at 2074 (noting the lack of a requirement under international law to apply comity).
[23] Republic of Hungary v. Simon, 207 L. Ed 2d 1114 (2020); Philipp, 894 F.3d at 406.
[24] *See* Federal Republic of Germany v. Philipp, 592 U.S. ____ (2021) (remanding for improper application of the Foreign Sovereign Immunities Act and its exceptions); Republic of Hungary v. Simon, 592 U.S. ____ (2021) (same).
[25] *See generally French Alliance, French Assistance, and European Diplomacy During the American Revolution, 1778-1782*, THE UNITED STATES OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1776-1783/french-alliance.
[26] Sam Kleiner & Julian Beach, *Two Second Circuit Decisions Shed Light on the Fine Line Between a Foreign State's "Commercial" and "Sovereign" Activity*, JUSTSECURITY.ORG (July 16, 2020).
[27] *Id.*
[28] *Id.*; 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1601-1611; *See generally*, Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as 28 U.S.C. § 1605) (1976) (the "FSIA").
[29] David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1441-1442 (1983).

guidelines Congress had hoped for; in fact, it leaves much to be elucidated.[30] Recently, the Supreme Court granted certiorari on the international comity question[31] but reversed the case on other grounds.[32] Now, it is vital that Congress provide clarity on when the American judicial system should take a step back from litigation that is more suited for adjudication abroad based on the weight of international policy concerns and foreign and domestic interests.

A recent clash in opinions between the D.C. Circuit and the Seventh Circuit shows that the judicial system needs a clear rule.[33] Part I of this note will analyze the rise of international comity. Part II will discuss the disorganization in the D.C. Circuit and the juxtaposition between its holdings and that of the Seventh Circuit. Part III will address the public policy concerns to be considered and weighed in favor of varying approaches to international comity. Finally, Part IV will address the problem with the proposition of a two-part legislative action: (i) statutes should require a showing of a contrary policy interest by courts before declining to exercise jurisdiction over a case, making courts more likely to focus on the effects of their decision; and (ii) prospective legislation should implement a factor test to determine the application of international comity, ensuring consistency across decisions and the ripeness of the original intent behind international comity. Ultimately, this note will argue that the ambiguity hanging over the doctrine of international comity has rendered it unsuccessful in effectuating its original purpose and that Congressional action is the best way to correct it.

I. DIVERGING STRATEGIES: THE FSIA AND INTERNATIONAL COMITY

[30] *See generally* Dodge, *supra* note 18. *See, e.g.*, Abrams v. Societe Nationale Des Chemins De Fer Francias, 389 F.3d 61, 64 (2d Cir. 2004) ("[T]here is still strong executive interest in granting immunity or there is an ambiguity regarding an FSIA exception."); Cruz v. United States, 219 F. Supp. 2d 1027, 1035 (N.D. Cal. 2002) ("[T]he Court finds that the FSIA does not contain a clear expression of statutory intent[.]"); Karcher v. Islamic Republic of Iran, 396 F. Supp. 3d 12, 58 (D.D.C. 2019) ("[T]he Court construes the FSIA's ambiguities broadly."); Jin v. Ministry of State Security, 557 F. Supp. 2d 131, 138 (D.D.C. 2008) ("[C]haracterization of the alleged activities [under the FSIA] as either commercial or uniquely sovereign was unclear."); Trout v. Winter, 464 F. Supp. 2d 25, 33 (D.D.C. 2006) ("[T]he Supreme Court discussed the ambiguity surrounding whether the statute might be intended to be retroactive.").

[31] Republic of Hungary v. Simon, 207 L. Ed. 2d 1114 (2020).

[32] *See generally* Republic of Hungary v. Simon, 141 S. Ct. 691 (2021).

[33] *Compare Simon*, 911 F.3d at 1172 *with Fischer*, 892 F.3d at 915.

Traditionally, deference was given to the executive branch in deciding which foreign states were granted or denied sovereign immunity.[34] Even where a federal court weighed in on the question, the Supreme Court acknowledged the State Department's decision as final.[35] In 1943, Peru sought immunity from suit for the loss of cargo.[36] Despite the State Department granting Peru's request for immunity, a Louisiana district court ruled that Peru had waived immunity, and the Supreme Court was called on to referee.[37] In the interest of keeping an untainted composure in the global community, the Supreme Court upheld the government's award of immunity.[38]

A mere two years later, the Supreme Court doubled down on the rule.[39] In a case involving Mexico,[40] the Department of State abstained from giving a recommendation on immunity, leaving the decision to the courts. The Supreme Court, however, found that even where the judicial branch is left to make decisions without guidance from the executive, it must do so in reliance on "the principles propounded by the Department of State."[41] The Supreme Court was particularly concerned with "embarrassing" the executive branch with conflicting opinions.[42] However, as commercialism expanded, governments started acting in roles similar to those of private parties—trading and manufacturing for profit.[43] Thus, policy concerns started to shift, and a more restrictive regime was adopted.[44]

A. The Tate Approach: Contradicting Checks and Balances

The Tate Approach,[45] effected by the executive branch in 1952, was an effort to limit absolute immunity, which was disappearing throughout the world as a

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[34] Andrew B. Pittman, *Ambassadorial Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts*, 58 WASH. & LEE LAW. REV. 645, 676 (2001).
[35] Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT'L L. REV. 445, 449 (1999).
[36] *See Ex parte Republic of Peru*, 318 U.S. 578 (1943).
[37] Swanson, *supra* note 35, at 449 (*citing Ex Parte Republic of Peru*, 318 U.S. 578 (1943)).
[38] *Id.*
[39] *Id.*
[40] Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).
[41] Swanson, *supra* note 35, at 450 (*citing Hoffman*, 324 U.S. at 30).
[42] *Id.*
[43] *Id.* at 450-51.
[44] *Id.* at 451.
[45] The Tate Approach was named for Jack Tate, the Acting Legal Adviser for the Department of State in 1952.

growing number of governments started involving themselves as parties to private, commercial transactions.[46] Specifically, the Tate Approach granted immunity "only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions."[47] Soon after its implementation, the Tate Approach blurred the lines of sovereign immunity.[48] Parties would often disagree about which government activities, governmental or proprietary, gave rise to the cause of action.[49] The executive branch, acting as a pseudo-judicial body, began to hear what essentially became small trials on the issue of immunity, including the submission of briefs and oral arguments.[50] It was not long until the Department of State was creating a legal standard that was applied irregularly, usually when it was in the best interest of foreign governments rather than the citizens those governments were meant to protect.[51] For example, in *Isbrandtsen Tankers, Inc. v. President of India*, the Second Circuit applied immunity even where the foreign sovereign, India, had explicitly waived its immunity by contract.[52] With this "nebulous executive decision-making[,]" the law became unpredictable and inconsistent.[53]

B. The FSIA: Congress' First Step for Foreign Immunities

The FSIA was drafted in response to the staggering growth of power that the State Department exercised over foreign immunities.[54] Congress codified the FSIA as a restrictive principle of international relations that provides a general immunity

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[46] Swanson, *supra* note 35, at 451.
[47] Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1976).
[48] Swanson, *supra* note 35, at 451.
[49] *Id*. at 452.
[50] *Id.*
[51] *Id. See also* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971) (holding that they must apply the Department of State's suggestion of immunity to dismiss the action); Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358-60 (2d Cir. 1964) (commenting that the Department of State's prior decisions forces them apply a restrictive approach to foreign immunity).
[52] *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201.
[53] Frederick G. Boynton, *International Law—Sovereign Immunity—The Last Straw in Judicial Abdication*, 46 TUL. L. REV. 841, 847-48 (1972).
[54] Pittman, *supra* note 34, at 676; *See also* U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, *Foreign Sovereign Immunities Act*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process/Foreign-Sovereign-Immunities-Act.html.

for all foreign states and their agents.[55] As a matter of policy, the FSIA acts to enforce foreign relations and avoid friction with other sovereign states while eliminating the requirement of submitting to the executive's discretion.[56] Notwithstanding Congress working towards more durable international relations, it recognized that absolute immunity would be far too lenient; hence, the State Department's initial attempt to implement the Tate Approach.[57] Knowing the FSIA would have to merge the two ideas—an absolute immunity and a strict no-immunity presumption—Congress necessitated an agreement with the U.S. as a basis for protection granted through the immunity.[58] "The FSIA's presumptive immunity is 'subject to existing international agreements to which the United States [was] a party at the time of [the FSIA's] enactment.'"[59]

In contrast to absolute immunity, the United States has an interest in settling disputes that involve its citizens.[60] Thus, Congress worked to implement exceptions to sovereign immunity, generally requiring the plaintiff to meet a burden of affirmatively showing a particular exception.[61]

C. Exceptions to the Rule: Commercial v. Governmental Activity

Commercial activity exceptions have been a major point of contention in the legal world due in part to the lack of clear requirements.[62] Under Section 1605, a foreign state does not enjoy immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state" or "in which rights in property taken in violation of international law are in issue and that property… is present in the United States in connection with a commercial activity" (the "Expropriation Exception").[63] When adjudicating a motion under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction[64] in a case of this nature, the court

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[55] Brittenham, *supra* note 29, at 1440.
[56] Pittman, *supra* note 34, at 683.
[57] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2153 (1999).
[58] *Id.*
[59] *Id.* (*quoting* 28 U.S.C. § 1604).
[60] Swanson, *supra* note 35, at 454.
[61] *Id.* at 446 (*citing* 28 U.S.C. § 1605(a)(1)-(7), (b)).
[62] *Id.* at 455.
[63] 28 U.S.C. § 1605(a)(2)-(3).
[64] When a party to a suit moves under Fed. R. Civ. P. 12(b)(1) to dismiss a case, a judge can make a determination on whether the court may exercise subject matter jurisdiction on the matter before them, meaning decide whether the court is in an adequate position to hear the type of claim being

must look "beyond the pleadings[.]"[65] In other words, the court should be assessing the factual record to determine whether the "commercial activity" alleged is similar to how a private party engages in commerce.[66] For example, in *Keller v. Central Bank of Nigeria*,[67] the Sixth Circuit found that engaging in commercial activity outside of the U.S. that had a direct impact in the U.S. was enough to quash immunity under the FSIA.[68] In contrast, expropriations of property, which Congress incorporated within another exception of the FSIA, are inherently noncommercial.[69]

How does this apply practically in cases brought before American courts? As this note will address in the following section, courts have seldom had a clear handle on how far these exceptions reach.[70] In its recent decisions, the Supreme Court set at least one touchstone limit on the use of the Expropriation Exception: "the expropriation exception's 'reference to violation of international law does not cover expropriations of property belonging to a country's own nationals.'"[71] For instance, in *Republic of Austria v. Altmann*, there was no violation of international law where valuable artworks were taken from Austrian citizens by an extension of

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brought. Cody C. Bailey, *All Wound Up: Unraveling the Application of FRCP (12)(B)(1) Versus FRCP 56 Under the Federal Tort Claims Act*, 79 Miss. L.J. 757 (2010). *See also Jurisdiction*, Black's Law Dictionary (11th ed. 2019) ("Jurisdiction over the nature of the case and the type of relief sought; the extent to which the court can rule on conduct of persons or the status of things.").

[65] Servaas Inc. v. Republic of Iraq, 686 F. Supp. 2d 346 (S.D.N.Y. 2010) (finding that in reference to a motion to dismiss that involves a foreign state, "the Court must look beyond the pleadings to the factual record to determine whether to grant the motion to dismiss").

[66] Philip White Jr., *Exceptions to Jurisdictional Immunity of Foreign States and Their Property Under Foreign Sovereign Immunities Act of 1976 (28 U.S.C.A. § 1605(a)(2))—Commercial Activity Elsewhere with Direct Effect in the United States*, 61 A.L.R. Fed. 2d §§ 9, 14 (2012; *See also* Jam v. Int'l Finance Corp., 139 S. Ct. 759 (2019) (holding that the lending of development banks may not be considered "commercial" under the meaning of the FSIA).

[67] Keller v. Central Bank of Nigeria, 277 F.3d 811 (6th Cir. 2002) (*rev'd on other grounds,* Samantar v. Yousef, 130 S. Ct. 2278 (2010)); *compare In re Terrorist Attacked on September 11, 2001*, 349 F. Supp. 2d 765, *cert. denied*, 129 S. Ct. 2859 (2009) (ruling that where a direct effect on the U.S. could not be derived from commercial activity, there was no exception to immunity under the FSIA).

[68] White Jr., *supra* note 66, at § 13.

[69] White Jr., *supra* note 66, at § 9 (2012); *See also* Petersen Energia Inversora S.A.U. v. Argentine Republic and YPF S.A., 895 F.3d 194 (2d Cir. 2018) (*quoting* Garb v. Republic of Poland, 440 F.3d 579, 586 (2d Cir. 2006)) ("expropriations… do not fall within the 'commercial activity' exception of the FSIA [because] [e]xpropriation is a decidedly sovereign—rather than commercial—activity.").

[70] *See, e.g.*, Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 678 (7th Cir. 2012); *Fischer*, 892 F.3d at 915; *Simon*, 911 F.3d at 1172; Philipp, 894 F.3d at 406.

[71] Federal Republic of Germany v. Philipp, 141 S.Ct. 703, 709-12 (2021) (*quoting Altmann*, 541 U.S. at 713 (BREYER, J., concurring) (internal quotations omitted)).

the Austrian Government.[72] Nevertheless, while not an issue expressly addressed in this note, takings that implicate genocidal acts remain confusing to courts in exercising jurisdiction.[73]

D. International Comity: Doctrine Flying Under the Radar

Comity[74] has been recognized in American law for over a century—in 1872, Joseph Story introduced the idea of a functional international system of comity in his well-knowntreatise of conflicts of law.[75] Indeed, it was the doctrine of international comity that provided the foundation for Congress to build the FSIA.[76] Despite this connection, international comity as a whole remains separate from Congressional legislation for sovereign immunities.[77] And yet, precedent gives little direction on how the doctrine applies.

Even "courts and commentators repeatedly confess that they do not really understand what international comity means."[78] Indeed, it is clear that the judicial branch has yet to assert a specific analysis for international comity.[79] Yet the Supreme Court has urged that a factual record must indicate a viable exception, leaving the plaintiff in an action against a foreign state with a high burden to succeed in even litigating claims, let alone prevailing on the merits.[80] This fact makes it all the more logical that a clear analytical framework is required and that Congress must step in to fill the gaps of its previous legislation. Nevertheless, it has failed to do so. This "asleep-at-the-wheel" attitude towards foreign immunity and the concept of comity has left courts contradicting each other at every turn, unsure

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[72] *Altmann*, 541 U.S. at 708 (BREYER, J., concurring).
[73] *See generally* Françoise N. Djoukeng, *The Law of Nations and the United States Constitution: Genocidal Takings and the FSIA: Jurisdictional Limitations*, 106 GEO. L.J. 1883 (2018).
[74] "A principle or practice among political entities… whereby legislative, executive, and judicial acts are mutually recognized." *Comity*, Black's Law Dictionary (11th ed. 2019).
[75] Joseph Story & Edmund H. Bennett, *Commentaries on the Conflicts of Law: Foreign and Domestic, in Regard to Contract, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* §§ 7-9 (7th ed. 1872).
[76] Dodge, *supra* note 18, at 2085. *See also* The Santissima Trinidad, 20 U.S. 283, 352 (1822) (stating that sovereign immunity "stands upon principles of public comity and convenience").
[77] *Id.* at 2118-19.
[78] *Id.* at 2073.
[79] *Id.*
[80] *Id.*

what, if any, legal standards apply.[81] Most recently, the D.C. Circuit and the Seventh Circuit are the culprits of such contradiction.[82]

II. CLASH OF THE COURTS: AN EXHAUSTION BATTLE

The conflict between unclear legislation and judicial discretion has made it that much more difficult for courts to fully grasp international comity.[83] While the circuits themselves are divided on how to handle the situation, district courts are also at war with their appellate counterparts.[84]

A. Friendly Fire: Internal Conflict in the D.C. Circuit

"Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary."[85] In *Simon v. Republic of Hungary*, fourteen individual plaintiffs brought a putative worldwide class action, seeking class certification in an action against the Hungarian Government (Hungary) and Magyar Államvasutak Zrt. (MÁV), the agent that runs the Hungarian National Railway.[86] The plaintiffs asserted a right to relief because, between the years of 1941 and 1944, Hungary and MÁV collaborated in a scheme to swiftly eradicate Jewish Hungarians before the

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[81] *See* Gau Shan Co., v. Bankers Trust Co., 956 F.2d 1349, 1350 (6th Cir. 1992) (reversing the lower court's application of international comity); Dependable Highway Exp., Inc v. Navigators Ins. Co., 498 F.3d 1059, 1070 (9th Cir. 2007) (same).

[82] *Compare Simon*, 911 F.3d at 1172 (finding an exception to sovereign immunity under the FSIA where Hungarian Nazis were accused of stripping civilians of their property); *Philipp*, 894 F.3d at 406 (applying the same exception where German Nazis were accused of stealing valuable art) *with Fischer*, 892 F.3d at 915 (refusing to exercise subject matter jurisdiction over a claim that Hungarian Nazis stole civilian property in the interest of international comity).

[83] Dodge, *supra* note 18, at 2073.

[84] *See Gau Shan Co*., 956 F.2d at 1350; *Dependable Highway Exp., Inc*., 498 F.3d at 1070; *Simon*, 911 F.3d at 1172.

[85] *Simon*, 911 F.3d at 1172; *See also* Rozett Robert, *Hungary and the Jews. From Golden Age to Destruction, 1895-945*, SCIENCESPO (September 21, 2015), https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/hungary-and-jews-golden-age-destruction-1895-1945.html ("The destruction of the Jews living in Hungary in 1944 was characterized by speed and intensity.").

[86] Suit was originally also brought against Rail Cargo Hungaria Zrt. ("RCH"), the successor-in-interest to MÁV Cargo Arufuvarozasi Zrt., a division of MÁV. Simon v. Republic of Hungary, 37 F. Supp. 3d 381, 390 (D.D.C. 2014) ("Simon I"); Compl. at 4, Simon v. Republic of Hungary, 37 F. Supp. 3d 381, 390 (D.D.C. 2014). RCH was subsequently released from the suit upon a statement of interest from the government expressing that RCH was now an almost entirely Austrian-owned company that has put forth significant effort in providing relief to Holocaust victims and asking for its dismissal from the case in the interest of foreign relations. *See* Simon I at 392-93.

end of World War II.[87] In conjunction with this plan, agents of Hungary rounded up scores of Jewish civilians and directed them to trains operated by MÁV.[88] There, the plaintiffs in *Simon* allege that operatives of MÁV took private property from them and other nationals before corralling them into jam-packed trains to Auschwitz and other concentration camps, where over half-a-million were killed or used for slave labor.[89]

1. Simon I: The Shot Heard Round the World

The plaintiffs averred that their possessions—wedding rings, jewelry, gold, furniture, clothing, bedding, art, and various other items—were sold, at least in part, to aid in payment for transportation services provided by MÁV to the Hungarian government.[90] Now, they seek tens of billions of dollars from Hungary—the gross domestic product ("GDP") of which was a mere $156 billion in 2019, and shrank by 13.6 percent since the onset of the COVID-19 pandemic.[91] To gain perspective, the U.S. GDP for 2019 was $24.43 trillion,[92] meaning that, with the same 48% as the *Simon* plaintiffs ask from Hungary, the U.S. would have been made to pay out

[87] Simon v. Republic of Hungary, 812 F.3d 127, 133 (D.C. Cir. 2016).
[88] *Id. See also* Cmpl. at 4, Simon v. Republic of Hungary, 37 F. Supp. 3d 381, 390 (D.D.C. 2014).
[89] *Id.*
[90] Cmpl. at 6-8, Simon v. Republic of Hungary, 37 F. Supp. 3d 381, 390 (D.D.C. 2014).
[91] *2019 Investment Climate Statements: Hungary*, UNITED STATES DEPARTMENT OF STATE (2019); *see also Hungary's Budget is Expected to Post a Shortfall of 7-9 Percent of GDP in 2020*, ABOUT HUNGARY (Aug. 25, 2020), http://abouthungary.hu/news-in-brief/hungarys-budget-is-expected-to-post-a-shortfall-of-7-9-percent-of-gdp-in-2020/; *Economic Forecast for Hungary*, EUROPEAN COMMISSION (Nov. 2020), https://ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-performance-country/hungary/economic-forecast-hungary_en.
[92] *Gross Domestic Product, Fourth Quarter and Year 2019 (Advance Estimate)*, BUREAU OF ECONOMIC ANALYSIS (Jan. 30, 2020 at 8:30 AM), https://www.bea.gov/news/2020/gross-domestic-product-fourth-quarter-and-year-2019-advance-estimate.

$11.75 trillion.[93] Without a doubt, this level of penalty "would devastate Hungary's economy today[.]"[94]

Importantly, the case that presented itself in Simon I was foreign-cubed: a foreign sovereign, taking property from its own foreign citizens, within its own foreign sovereign borders.[95] Thus, the core of the matter was whether adjudication by American courts could be justified in such a case.[96] The District Court for the District of Columbia initially focused on the FSIA in its review of the case.[97] In its holding, the court noted that the application of the law could sometimes be blurred by the moral understanding of an issue.[98] The *Simon* Court focused on *Princz v. Federal Republic of Germany.*[99] The central issue in *Princz* surrounded "application of the FSIA where the acts alleged [were] so egregious and reprehensible that members of civilized society feel propelled to rectify the wrongs."[100] The court in *Simon* emphasized that the D.C. Circuit dismissed the *Princz* case, even after the D.C. District Court ruled that the FSIA, and therefore immunity, did not apply to "undisputed acts of barbarism by a one-time outlaw nation[.]"[101] Following this logic, the *Simon* Court observed that immunities

[93] While the *Simon* decisions do not list an exact dollar amount sought, it stands in the tens of billions of dollars, and a $75 billion dollar judgment has been alluded to in a parallel case. *See* Philipp v. Federal Republic of Germany, 925 F.3d 1349, 1354 (2019) ("[i]n a case that, like *Simon*, involved Jews who lost property in the Hungarian Holocaust, the damages sought were some $75 billion"). *See also* On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Brief for Petitioners, Republic of Hungary v. Simon, No. 18-1447 at 50 (Sep. 4, 2020) ("Simon Writ") (*citing Philipp*, 925 F.3d at 1357) ("[H]ow would U.S. courts balance "the nearly existential threat of a $75 billion lawsuit" by Holocaust survivors and their descendants against the needs of Hungary and its people today?").
[94] Simon Writ at 38 (*citing Philipp*, 925 F.3d at 1357).
[95] Simon I at 385.
[96] *Id.* at 392.
[97] *Id.* at 397.
[98] *Id.* at 398.
[99] Princz v. Fed. Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1995).
[100] Simon I at 398.
[101] *Id.* at 398 (*citing Princz*, 26 F.3d at 1169).

reflected global politics and used an abundance of precedent[102] to support granting Hungary's motion to dismiss.[103]

2. Simon II: Seeking Legal Rectification

On appeal, the D.C. Circuit emphasized the nature of the acts in question, but pointedly differentiated passion from the law.[104] The Circuit Court found that the District Court erred in barring the plaintiffs' suit under the FSIA because there was no agreement between the U.S. and Hungary that would afford them immunity.[105] Specifically, the D.C. Circuit highlighted that the treaty exception of the FSIA should provide immunity only where the treaty in question confers "*more* immunity than would the FSIA[.]"[106] The D.C. Circuit then underscored a Seventh Circuit

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[102] *See e.g., Princz*, 26 F.3d at 1169 (dismissing Holocaust-related claims under the FSIA for lack of subject matter jurisdiction); *Garb*, 440 F.3d at 582 (dismissing expropriation claims under foreign sovereign immunity); Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 74 (2d Cir. 2005) (dismissing Holocaust survivors' claims on the grounds of political question); Alperin v. Vatican Bank, 410 F.3d 532, 561-62 (9th Cir. 2005) (dismissing similar claims because immunity is a political question); *Abrams*, 389 F.3d at 64-5 (dismissing for lack of subject matter jurisdiction under the FSIA); Deutsch v. Turner Corp., 324 F.3d 692, 703 (9th Cir. 2003) (dismissing California law claims asserted by Holocaust survivors under the foreign affairs doctrine); Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1146 (7th Cir. 2001) (dismissing for lack of subject matter jurisdiction and lack of standing); Wolf v. F.R.G., 95 F.3d 536, 544 (7th Cir. 1996) (dismissing Holocaust-related claims in absence of subject matter jurisdiction); Haven v. Rzeczpospolita Polska, 68 F. Supp. 2d 947, 958 (N.D. Ill. 1999) (dismissing similar claims under immunity of the FSIA); Hirsch v. State of Israel, 962 F. Supp. 377, 379 (S.D.N.Y. 1997) (dismissing Holocaust survivors' claims under the FSIA immunity); Orkin v. Taylor, 487 F.3d 734, 738 (9th Cir. 2007) (dismissing claims that plaintiff's property was expropriated by Nazis for failure to state a claim).

[103] Simon I at 405-06. Notably, the court in *Simon* also claimed that a peace treaty between Hungary and the U.S. preempted any exception argument under the FSIA because exercising jurisdiction over the defendants would violate the treaty, provisions that address claims arising out of World War II. Indeed, Article 27 of the treaty sets forth that Hungary will take responsibility for all property subject to "sequestration, confiscation, or control on account of the racial origin or religion of such persons, the said property… shall be restored [or]… if restoration is impossible, that fair compensation shall be made therefor." Hungarian Peace Treaty, Art. 27, 24 U.S.T. 1141 (1973). Even further, Article 40 dictates that any dispute arising from the interpretation or execution of the treaty shall follow a specific procedure of diplomatic negotiations and, if necessary, proceed through a specified dispute body under Article 39 therein. Additionally, the court emphasized the Supreme Court's confirmation that where an "express conflict" between international agreements and provisions of the FSIA exists, the treaty shall prevail. By dictating a sole and exclusive mechanism for disputes, the treaty preempted the application of the Expropriation Exception[103] of the FSIA, and the court dismissed the case.

[104] *Simon*, 812 F.3d at 132 ("Simon II").

[105] Simon II at 132.

[106] *Id.* at 135.

analysis, finding that while the treaty imposed an obligation on Hungary to rectify property expropriations resulting from the Holocaust, it did not limit the victims' avenues for relief.[107] In remanding the case, the D.C. Circuit stressed the decisions in both *Abelesz v. Magyar Nemzeti Bank* and *Fischer v. MÁV*, and urged the lower court to follow the Seventh Circuit's lead.[108]

3. Simon III: Following the Directive of Command

On remand, the District Court dismissed the claims a second time on two grounds: *forum non conveniens*[109] and international comity.[110] Turning its reliance to the Seventh Circuit, as directed by the D.C. Circuit, the District Court found that the plaintiffs had a duty of "prudential exhaustion" under the FSIA, meaning they should seek remedial avenues in Hungary before bringing the case to the U.S.[111] With roots granted in the *forum non conveniens* doctrine, this exhaustion as it applies to international comity can only be overcome if Hungary: (i) did not provide a comparable remedy to the U.S. justice system, (ii) had in place procedural bars that made relief "so clearly inadequate or unsatisfactory that it is no remedy at all," or (iii) possessed only an inadequate court system to apply the remedy sought.[112] Drawing on Supreme Court precedent,[113] the court accentuated the desire of U.S. courts to "minimize international friction."[114] Despite giving deference to the plaintiffs' choice of forum, the court found that the FSIA required them to exhaust their legal options in Hungary before suing in the United States. Moreover, applying the factors of *forum non conveniens*, the court found both the public and private interests weighed in favor of dismissal.[115]

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[107] *Id.* at 137 (*citing Abelesz*, 692 F.3d at 695).
[108] *Id.* at 151 (*citing Abelesz*, 692 F.3d at 661); *Fischer*, 777 F.3d at 847.
[109] *Forum non conveniens* is applied where "an appropriate forum—even though competent under the law—may divest itself of jurisdiction or, for convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." *Forum Non Conveniens*, Black's Law Dictionary (11th ed. 2019).
[110] Simon v. Republic of Hungary, 277 F. Supp. 3d 42, 67 (D.D.C. 2017) ("Simon III").
[111] *Id.* at 53 (*citing Abelesz*, 692 F.3d at 661; *Fischer*, 777 F.3d at 847).
[112] *Id.* at 55.
[113] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
[114] Simon III at 53 (*citing Fischer*, 777 F.3d at 859).
[115] Simon III at 65, 67.

4. Simon IV: The Turncoat Court

Fully abandoning its prior directive, the D.C. Circuit shot down the lower court's judgment yet again.[116] Specifically, concerns arose regarding the preclusion of U.S. involvement if plaintiffs exhausted their Hungarian remedies: "there is a substantial risk that the [plaintiffs'] exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States."[117] In a desperate reach for control, the Circuit undermined a long-standing doctrine of the legal community without an authentic basis. One purpose of requiring exhaustion of remedies in a foreign state is to clear a case from the U.S. dockets and effectively utilize judicial resources domestically.[118]

Notwithstanding the apprehension of policy, the D.C. Circuit wrote that the prior decision was also based on substantial legal error.[119] Turning its attention away from the Seventh Circuit, the court used its own newfound precedent from the *Philipp* case.[120] In *Philipp,* the D.C. Circuit assessed the expropriation of art pieces by the German government under the Nazi regime and decided to exercise jurisdiction over the case.[121] Following suit, the *Simon* court interpreted the FSIA not to require plaintiffs to exhaust foreign remedies.[122] Yet, in the same ruling, it neglected to differentiate the rudiments of the FSIA from the entirely distinct international comity.[123] It was the D.C. Circuit's assertion that abstaining on a comity basis in favor of a prudential exhaustion in Hungary would "amount to a judicial grant of immunity[,]"[124] but that is not the case. An exhaustion requirement does not necessitate a grant of immunity—quite the opposite, in fact—it leaves the doors to the courthouse open for parties to relitigate in the U.S. should the need

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[116] *See Simon*, 911 F.3d at 1190 ("Simon IV").
[117] *Id*. at 1180.
[118] Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1522 (11th Cir. 1994) (applying international comity in dismissing the case after considering the "efficient use of scarce judicial resources" in the U.S.); *Mujica*, 771 F.3d at 598 (quoting Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997)) ("Comity is a 'rule of practice, convenience, and expediency[.]'").
[119] Simon IV at 1176.
[120] Philipp, 894 F.3d at 406.
[121] *Id.*
[122] Simon IV at 1176.
[123] *Id.* at 1181. *See also Abelesz*, 692 F.3d at 671 (articulating that the FSIA does require a "prudential exhaustion").
[124] *Id*. at 1180.

arise.[125] Thus, the argument that Congress expressly withdrew an *ad hoc* consideration of immunity does not pertain to the use of international comity as the D.C. Circuit contended.

In its decision, the D.C. Circuit fundamentally misunderstood the doctrine of international comity by conflating it with foreign immunities.[126] Regardless of this fallacy, comity remains a doctrine for declining the use of existing jurisdiction, while sovereign immunity vitiates jurisdiction altogether.[127] Further confounding the point, the D.C. Circuit postulated that where the FSIA grants jurisdiction, international comity is estopped.[128] Relying heavily on express congressional language, the D.C. Circuit emphasized that the FSIA does not explicitly require prudential exhaustion,[129] but made no note of the fact that it does not categorically dismiss or debar the use of international comity abstention either.[130] Thus, the Simon IV court erroneously reversed.[131] Next, the court reversed the *forum non conveniens* ruling due to the D.C. District Court's alleged miscalculation[132] of the public[133] and private[134] interest factors.[135] The D.C. Circuit determined that the

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[125] *See* Ron A. Ghatan, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1295 (2011) (discussing the gatekeeping function of exhaustion requirements).
[126] Simon IV at 1180.
[127] *See* Dodge, *supra* note 18, at 2074.
[128] Simon IV at 1180.
[129] *Id.* at 1180.
[130] *See* FSIA (codified as 28 U.S.C. § 1605).
[131] Simon IV at 1190.
[132] The D.C. District Court began its analysis by essentially relieving Hungary of its burden to prove that both private and public factors favored another forum. Simon IV at 1184-85.
[133] In weighing public-interest factors, the district court found that Hungary had a stronger moral investment, but the D.C. Circuit refuted that inference by pointing to the seventy-year history that Hungary has had to rectify its harms, and its failure to do so. Simon IV at 1187 (*citing* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981)). Despite the D.C. Circuit's contention, Hungary effected a series of Compensation Acts in the early 1990s aimed at curing its indiscretions. *See* On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Brief for Petitioners, Republic of Hungary v. Simon, No. 18-1447 at 36-8 (Sep. 4, 2020) (*citing* J.A. 246-247) (discussing the Compensation Acts, two of which provided $226 million in compensation for similarly situated Holocaust victims).
[134] In private-interest factors, the lower court emphasized the existence of records in Hungary and their translation requirements and the availability of witnesses. The circuit court insisted that a substantial amount of documentation was collected in the U.S., that plaintiffs who are English speakers will likely require translation, and that electronic documentation makes global discovery much simpler. Simon IV at 1186-87 (*citing Piper Aircraft Co.*, 454 U.S. at 241, 258).
[135] Simon IV at 1182, 1190.

lower court "set the scales wrong from the outset" by only affording "minimal deference"[136] to the plaintiffs' choice of forum [137]

5. The Resulting Civil War: Disorder in D.C.

The failure of the D.C. District Court and the D.C. Circuit Court to agree has put international comity in the middle of a game of legal tug-of-war.[138] It is the same disagreement that separates the D.C. Circuit from related opinions in the Seventh Circuit.[139] From its first viewing of *Simon*, the D.C. Circuit has turned completely about-face from the Seventh Circuit's rationale giving deference to international comity.[140] Moreover, the D.C. Circuit doubled down on its deviation from an analysis that it had so recently praised, and enforced its own reasoning by denying the application of comity for two other major cases dealing with expropriation during the Holocaust.[141] Meanwhile, the Seventh Circuit in *Abelesz v. Magyar Nemzeti Bank*[142] and *Fischer v. Magyar Államvasutak Zrt.*,[143] interpreted international comity to include a higher bar for plaintiffs as the D.C. District Court exemplified.

B. Conflict Abroad: The Weight of International Issues in the Seventh Circuit

In the Seventh Circuit, courts have put much more emphasis on the discretionary practice of international comity.[144] In the recent *Abelesz* case, litigation by Holocaust survivors asserting almost identical claims to those in *Simon*

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[136] In any case, the plaintiff's choice of forum is given a strong presumption when faced with a procedural challenge. Here, the D.C. District Court only afforded "minimal deference" to the plaintiffs' selection because out of fourteen named plaintiffs, only four were U.S. citizens—a status they only obtained several decades after the events giving rise to the claims occurred. However, the American citizens have a "weighty interest" to seek remedy in their own courts, so the Circuit Court insisted on a strong presumption. Simon IV at 1183 (*citing* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
[137] Simon IV at 1183.
[138] *Compare* Simon III *with* Simon IV.
[139] *Compare* Simon IV *with Fischer*, 892 F.3d at 915.
[140] *Compare* Simon II *with* Simon IV.
[141] *Philipp*, 894 F.3d at 406; de Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017).
[142] *Abelesz*, 692 F.3d at 661.
[143] *Fischer*, 892 F.3d at 915.
[144] *See Abelesz*, 692 F.3d at 661; *Fischer*, 892 F.3d at 915; *Abelesz*, 692 F.3d at 661.

was halted by international comity.[145] Under the FSIA, the plaintiffs claimed that instrumentalities of the Hungarian government had both waived their sovereign immunity and met the Expropriation Exception to immunity.[146] The court found no clear intent by Hungary, however, that suggests it meant to waive immunity in cases like the one arising in *Abelesz*, which the narrow rule requires.[147] Therefore, the court turned to the analysis of the Expropriation Exception under the FSIA.[148]

To defeat sovereign immunity by way of the Expropriation Exception, plaintiffs must show that their property was expropriated in violation of international law[149] and meets a nexus of commercial activity with the U.S.[150] This nexus is met where defendants: (i) are involved in commercial activity within the U.S., (ii) still possess the expropriated property or proceeds thereof, and (iii) which property or profit is used by the defendant in connection with the commercial activity in the U.S.[151]

1. Abelesz v. Magyar Nemzeti Bank: The Seventh Circuit Leading the Charge

First, the Seventh Circuit discredited the defendant's argument that bank accounts are not physical property by interpreting intangible property as sufficient to meet the FSIA standard.[152] Next, the court found the domestic taking of plaintiffs' bank accounts and acts of genocide committed by the defendants were not dependent on one another. Therefore, the takings could not constitute a

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[145] *Abelesz*, 692 F.3d at 697.
[146] *Id.* at 670.
[147] *Id.* (*citing* 28 U.S.C. § 1605(a)(1)).
[148] *Id.* at 671.
[149] With just compensation, takings find a legal pathway in the U.S. Constitution. U.S. CONST. amend. V. And, due to the general expectation that countries do not interfere in actions within a foreign sovereign's own boundaries, takings such as these are generally not disturbed across nations. *See* José E. Alvarez, *The Human Right of Property*, U. MIAMI L. REV. 580, 643 (2018). However, where a taking discriminates against a person or class of people, fails to serve a public purpose, or is not adequately compensated, it violates international law. As here, where the Nazi's expropriation was discriminatory, not in furtherance of any public interest, *and* not compensated, it certainly constitutes such a violation. *See* Françoise N. Djoukeng, *The Law of Nations and the United States Constitution: Genocidal Takings and the FSIA: Jurisdictional Limitations*, 106 GEO. L.J. 1883, 1898 (2018).
[150] *Abelesz*, 692 F.3d at 671.
[151] *Abelesz*, 692 F.3d at 686. *See also* Simon II at 146.
[152] *Id.* at 673 (*citing* Nemariam v. Federal Democratic Republic of Ethiopia, 491 F.3d 470, 472-473 (D.C. Cir. 2007)).

violation of international law to fulfill the expropriations exception of the FSIA.[153] Indeed, the Seventh Circuit ruled that the plaintiffs' argument was preempted by federal law in the Genocide Convention Implementation Act of 1987[154] which contained a comprehensive list of genocidal acts but did not list expropriation or theft.[155] Directly contradicting the Seventh Circuit, the D.C. Circuit in *Simon* found the government stripping the plaintiffs of their property before executing their premeditated murders to be acts of genocide that constituted violations[156] of international law.[157]

It is this allusion to international law, however, that gives rise to the idea of exhaustion of remedies.[158] While the FSIA does not include a specific exhaustion provision, the Seventh Circuit ruled that one could not contend property was taken in violation of international law, without first attempting to retrieve adequate compensation for such property.[159] Relying on precedent from the Supreme Court,[160] the Seventh Circuit emphasized that an exhaustion of remedies may be required in the foreign forum from which a takings claim arises.[161] Additionally, the court pointed to the U.S. government's diplomatic resolutions, which support

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[153] *Id.* at 677.
[154] 18 U.S.C. §§ 1091-93.
[155] *Abelesz*, 692 F.3d at 677. *But see* Matthias Weller, *Genocide by Expropriation—New Tendencies in the US State Immunity Law for Art-Related Holocaust Litigations*, CONFLICTSOFLAW.NET (September 13, 2018), https://conflictoflaws.net/2018/genocide-by-expropriation-new-tendencies-in-us-state-immunity-law-for-art-related-holocaust-litigations/.
[156] The Supreme Court recently ruled that any connection between expropriations and genocide does not satisfy the prerequisites of Expropriation Exception, and thus, these claims could not continue under that exception. *See* Federal Republic of Germany v. Philipp, 592 U.S. ____ (2021). *See also Abelesz*, 692 F.3d at 678; *Fischer*, 892 F.3d at 915; Simon IV; *Philipp*, 894 F.3d at 406.
[157] Alex Loomis, *Simon v. Republic of Hungary—Summary in Brief*, LAWFARE (February 5, 2016, 12:07pm), https://www.lawfareblog.com/simon-v-republic-hungary—summary-brief.
[158] *Abelesz*, 692 F.3d at 678.
[159] *Id. at* 679. *See also* George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179, 191-92 (2002) ("In the absence of an unlawful expropriation, that is, where the expropriation is not discriminatory or arbitrary and where adequate compensation is paid, the owner of the property will simply be entitled to the value of the property at the time of the taking, plus interest accruing to the time of the judgment or arbitral award.").
[160] *Altmann*, 541 U.S. at 677 ("[A] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.").
[161] *Id.* (*citing* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (ruling that courts should "certainly consider" the exhaustion of remedies before adjudicating a claim from a foreign forum).

deference to foreign forums in these types of cases.[162] In light of this precedent, the Seventh Circuit found that plaintiffs' claims required exhaustion of remedies in the international forum from which their takings assertion arose.[163] The failure of plaintiffs to expend these remedies in Hungary precluded their claims, and the Seventh Circuit dismissed the case.[164]

2. Fischer v. MÁV: Reinforcements in the Precedent War

To further the argument, the Seventh Circuit mirrored their opinion in a later case.[165] In *Fischer*, the District Court for the Northern District of Illinois followed the precedent set by the Circuit in *Abelesz*, and required that plaintiffs exhaust all remedies in Hungary before bringing suit in the U.S.[166] Without any assertion that Hungary had failed to afford the plaintiffs an opportunity to litigate their claims or were effectuating undue delay, the Northern District of Illinois found that the U.S. should give deference to the Hungarian forum.[167] The Seventh Circuit subsequently affirmed the decision, emphasizing that a court's ability to exercise subject matter jurisdiction is always discretional and the District Court's refusal to extend that jurisdiction due to international comity was a fair application of the law.[168]

The D.C. District Court relied on these decisions in applying international comity abstention in *Simon* and *Philipp.*[169] Surprisingly, it was these same decisions that also provided the D.C. Circuit its reasoning for remand when the *Simon* case first came before it.[170] Thus, it is the D.C. Circuit's divergence from a standard it once encouraged that further aggravated the doctrine of international

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[162] *See Id.* (*citing* American Convention on Human Rights, art. 46, Nov. 22, 1969, 1144 U.N.T.S. 123 (requiring remedied under domestic law be pursued and exhausted "in accordance with generally recognized principles of international law."); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 26, Nov. 4, 1950, 213 U.N.T.S. 221 ("The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law[.]")).

[163] *Id.* at 680 (*citing* Restatement (Third) of the Foreign Relations Law of the United States § 713 cmt. f).

[164] *Id.* at 697.

[165] *Fischer*, 892 F.3d at 915.

[166] *Id.*

[167] *Id.*

[168] *See Fischer*, 777 F.3d at 858 ("[The court] found that the comity at the heart of international law required plaintiffs either to exhaust domestic remedies in Hungary or show a powerful reason to excuse the requirement.").

[169] Simon IV.

[170] Simon III at 53 (*citing Abelesz*, 692 F.3d at 661; *Fischer*, 777 F.3d at 847).

comity.[171] Consequently, the Supreme Court granted certiorari in July of 2020 to address the cross-circuit disagreement on the issues raised in *Simon* and *Philipp*.[172]

III. HOSTILE INTERESTS: PUBLIC POLICY CONFLICTS IN APPLYING INTERNATIONAL COMITY

Certainly, both the D.C. Circuit and the Seventh Circuit have valid concerns regarding the public policy that accompanies international comity and the exhaustion rule.[173] The conflict of interest stands at the precipice of American courts' obligation to protect their own nationals and their duty to recognize foreign nations as sovereign.[174] Hence, any decision by a domestic court regarding a case that involves a foreign nation, will undoubtedly implicate international relations.[175] As it stands, international comity abstention does not reach a level of national obligation or responsibility, nor is it just a mere gesture of good faith—rather it is the country's showing of respect for the laws, processes, and procedures of a foreign state.[176]

A. Reciprocity: Creating Allies or Enemies

Nevertheless, courts in the past have approached the issue by balancing the U.S.'s own interest with the foreign forum's interest.[177] Most of the time, the outcome of such a test favors the U.S.'s domestic interests in protecting its citizens and adjudicating disputes in its own borders even though "international comity compels courts to consider the interests of foreign nations in the dispute."[178] The

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[171] *Compare* Simon IV *with* Simon III at 53.
[172] *See* Simon, 207 L. Ed. 2d at 1114; Federal Republic of Germany v. Philipp, 207 L. Ed. 2d 1114 (2020).
[173] *Fischer*, 777 F.3d at 847 ("This exhaustion principle, based on comity, is a well-established rule of customary international law."); *Abelesz*, 692 F.3d at 680 ("[The exhaustion] rule is based on the idea that the state where the alleged violation occurred should have an opportunity to redress it by its own means, within the framework of its own legal system."); Simon IV at 1189 (The interest of providing justice for holocaust victims within their remaining lifetimes "is part of a large United States policy to support compensation for Holocaust victims, especially its own citizens.").
[174] Ryan Beard, *Reciprocity and Comity: Politically Manipulative Tools for Protection of Intellectual Property Rights in the Global Economy*, 30 TEX. TECH L. REV. 155, 165 (1999).
[175] *Id.*
[176] *Id.* at 166.
[177] Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational* Discovery, 34 BERKELEY J. INT'L L. 157, 160 (2016).
[178] *Id.* at 162.

aim of awarding deference to foreign sovereigns is "maintaining amicable working relationships between nations" and preserving long-standing alliances.[179] But, should the U.S. seek steadfast relationships where the counterpart nation is simply not returning the favor?

In *Hilton v. Guyot*,[180] the defendant urged the Supreme Court not to enforce certain judgments of France because it would not reciprocate were France in the same position.[181] The Court agreed, holding that despite the repercussions on foreign relations, international comity derives from mutual respect, and the U.S. should owe no deference to a nation that refuses to reciprocate that courtesy.[182] This is not always the case, however. When the American judicial system was confronted with the same foreign interests in *Freund v. Republic of France*, it found that such interests were simply too ubiquitous to ignore, and the case was dismissed.[183]

Still, using reciprocity as an element of international comity serves to aid public policy in more ways than one.[184] By dismissing cases that should be brought in foreign nations out of an investment in comity, forum shoppers are deterred from suing in a less convenient forum merely because of procedural or legal advantages.[185] Additionally, when utilizing comity reciprocally the U.S. gains trust and rapport in the international community.[186] At the end of the day, every nation should give and receive "due regard both to international duty and convenience."[187] Even when acting as a prerequisite, however, reciprocity has not eclipsed international comity.[188] The Third Circuit found that it was unnecessary to judge

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[179] *JP Morgan Chase Bank*, 412 F.3d at 423.
[180] *Hilton v. Guyot*, 159 U.S. 113, 209-10 (1895).
[181] *Id.* at 228-29. *See also* Beard, *supra* note 175, at 167.
[182] Hilton v. Guyot, 159 U.S. 113, 167-68 (1895).
[183] Freund v. Republic of France, 592 F. Supp. 2d 540, 570, 581 (S.D.N.Y. 2008).
[184] Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169, 202 (2020).
[185] *Id.*
[186] *Id.*
[187] *Id.* at 170, n.1.
[188] Beard, *supra* note 174, at 169.

the doctrine of comity based on a foreign government's willingness to collaborate in the pursuit of legal justice,[189] and others followed.[190]

Another potential outcome of reciprocity to consider, is that it goes both ways.[191] If the American legal system fails to afford comity to nations like Hungary, there is no incentive for those nations to give the U.S. deference when it comes to similar claims arising out of its own misconduct.[192] Take for example slavery in the United States. A punitive class action of fourteen descendants of slaves bringing claims for 40 percent of the national GDP for atrocities committed by the United States within its own borders in a Hungarian court, would surely raise objection by the American government.[193] Nevertheless, without the rules of comity, there would be no reason for foreign courts to direct the case to American courts.[194] Therefore, even as the first actor in a chain of reciprocity, it is in the best interest of public policy to support international comity.

B. Dismissing Claims Without Prejudice: Claims Live to Fight Another Day

In any case, international comity does not have to be a complete bar on bringing litigation in the United States because it is excepted by several factors relating to the alternative forum's adequacy.[195] Moreover, a case that has been dismissed on international comity grounds is done so without prejudice, so if the alternative forum does not provide an adequate, fair, or timely resolution to the issue, claimants

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[189] Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971); Beard, *supra* note 174, at 170.

[190] *See, e.g.*, Canada Southern Railway Co. v. Gebhard, 109 U.S. 527, 539 (1883) (holding that "the true spirit of international comity requires" the U.S. to give deference to Canadian procedures); Clarkson Co. v. Shaheen, 544 F.2d 624, 631 (1976) (finding that "clear and convincing evidence" is needed to attack a foreign forum's judgment).

[191] Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflicts of Laws*, 72 COLUM. L. REV. 220, 234 (1972).

[192] Louisa B. Childs, *Shaky Foundations: Criticism of Reciprocity and the Distinction Between Public and Private International Law*, 38 N.Y.U.J. INT'L L. & POL. 221, 230 (2006).

[193] Even cases in the same contexts, already dismissed by federal courts on sovereign immunity grounds, could potentially be reraised in a foreign forum. *See, e.g.*, Cato v. United States, 70 F.3d 1103 (9th Cir. 1995).

[194] Childs, *supra* note 192, at 230.

[195] *See Fischer*, 777 F.3d at 862 (premising the application of international comity abstention on the adequacy of the alternative forum); *Mujica*, 771 F.3d at 603 (same); *Freund*, 592 F. Supp. 2d at 576 (same).

can re-raise the suit in the U.S.[196] The exhaustion of remedies requirement[197] is one way in which U.S. courts have afforded foreign sovereigns' comity, while still reserving the right to hear a case should foreign remedies turn out to be so unreasonable or unfair as to preclude the preservation of justice.[198] In fact, a long tradition of foreign policy in America has supported this exact rule.[199] A sensible compromise is to use this "prudential exhaustion"[200] to harmonize both international and domestic policy concerns.

International comity is perplexed by a shroud of ambiguity, failing to benefit any party in anticipation of litigation.[201] Specifically, it is unclear to some whether international comity stands as its own independent legal rule, or if it is a mere policy concept that may influence a decision, but not be dispositive of one.[202] Without a solid analytical framework from common law or a statute, courts and parties are left in the dark and an effective tool is lost in comity, leaving an opening for manipulation by individual judges' philosophies.[203] This is why Congress must step in and codify international comity, to resolve lingering obscurity.

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[196] *See, e.g.*, *Fischer*, 777 F.3d at 865-66 ("If plaintiffs attempt to bring suit in Hungary and are blocked arbitrarily or unreasonably, United States courts could once again be open to these claims"); Cooper v. Tokyo Elec. Power Co., No. 12cv3032-JLS (JLB), 2019 U.S. Dist. LEXIS 34154 at *49 (S.D. Cal. Mar. 4, 2019) (granting a defendant's motion to dismiss on international comity grounds without prejudice); Pravin Banker Associates v. Banco Popular del Peru, 165 B.R. 379, 384 (S.D.N.Y. 1994) ("Principles of international comity call for the recognition of foreign proceedings").

[197] Lucas Curtis, *The Supreme Court as a Tool of Foreign Policy?: Why a Proposed Flexible Framework of Established Judicial Doctrine Better Satisfies Foreign Policy Concerns in Alien Tort Statute Litigation*, 104 MINN. L. REV. 1647, 1684 (discussing how exhaustion acts to give deference to foreign states and allows them the chance to resolve their own issues, while also ensuring that parties are able to litigate).

[198] *See Turner Entertainment Co.*, 25 F.3d at 1522 (ensuring the parties' rights to litigate before dismissing for comity); Norex Petroleum v. Access Indus., No. 02 Civ. 1499, 2003 U.S. Dist. LEXIS 4276 at *3 (S.D.N.Y. Mar. 21, 2003) (lifting a stay on discovery to probe for corruption in the other forum).

[199] *See, e.g.*, Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2012)) (the "TVPA") (requiring exhaustion in the place in which the claims arose); American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 46, Nov. 22, 1969, 1144 U.N.T.S. 123 (1970) (mandating exhaustion of foreign remedies because accepting a petition for human rights violations); Gray v. United States, 21 Ct. Cl. 340, 402 (U.S. Ct. Cl. 1846) ("It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the local courts before he can fall back upon his Government for diplomatic redress.").

[200] *Abelesz*, 692 F.3d at 671.

[201] Estreicher & Lee, *supra* note 184, at 206.

[202] *Id.*

[203] *Id.* at 206-07.

IV. BRINGING PEACE TO WAR: CONGRESS CLARIFYING COMITY IN CODE

The issue currently is that, while the FSIA may lay out strict rules for exceptions to immunity, it is not clear whether U.S. courts are mandated to provide those exceptions, or if they retain the discretionary power to decline jurisdiction regardless. The FSIA is not as objectively comprehensive as Congress believed it would be when it provided for its implementation.[204] While intended to be a simple solution to complex intermingling of foreign relations and domestic litigation, the FSIA "ultimately makes [equality between foreign states and private parties in litigation] impossible and therefore requires frustrating compromises regarding typical conceptions of official accountability and social justice."[205] It is because of this volatility that Congress must intervene and clarify its prior legislative intent. The traditional textualist approach cannot cure the policy entanglements and legislative meaning underlying the FSIA, and a more substantive canon leaves the objective of such legislation vulnerable to misguided interpretation.[206]

Recently, a Vanderbilt scholar, Paige Tenkhoff, argued that the executive branch can adequately resolve this issue by executing agreements with former Nazi states, but this is a mere Band-Aid and the problem that has presented itself is no schoolyard cut.[207] International comity does not merely apply to the claims of Holocaust survivors—it is a concept that is imbedded in American history and is now coming to the forefront of the legal world today.[208] Tenkhoff claims that a statute by Congress allowing federal courts to maintain jurisdiction over these cases would likely violate international law, but she fails to consider a statute that addresses foreign policy concerns and almost certainly denies U.S. courts jurisdiction over recent Holocaust-related claims.[209] This problem implicates everything from federal civil procedure to foreign relations to human rights violations—it must be attacked at its core, and the only way to do that is with steadfast legislation.

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[204] John C. Balzano, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act: Searching for an Integrated Approach*, 24 DUKE J. COMP. & INT'L L. 1, 5 (2013) ("FSIA is a statute riddled with contradictions and conflicts."); *In re Air Crash Disaster Near Roselawn*, 909 F. Supp. 1083 (N.D. Ill. 1995).
[205] *Id.* at 5.
[206] *Id.* at 5-6.
[207] Paige Tenkhoff, *Artistic Justice: How the Executive Branch Can Facilitate Nazi-Looted Art Restitution*, 73 VAND. L. REV. 569, 599 (2020).
[208] Zambrano, *supra* note 177, at 215.
[209] Tenkhoff, *supra* note 207, at 600.

To remedy the confusion that surrounds international comity, a two-part legislative approach is crucial. First, courts' discretion in subject matter jurisdiction must be outlined in a clear, reviewable manner.[210] While judges have historically declined to use established subject matter jurisdiction to hear a case, it has never been codified, and thus there is an inherent level of inconsistency, subjective analysis, and lack of review.[211] Second, a balancing test should be implemented for international comity considerations in order to regulate its application and guide courts in making such decisions.[212] Employing a clear analytical framework for judicial discretion will bring a greater level of scrutiny to these decisions, enforce dependability in court rulings, and eliminate the friction that presently exists between the circuits.

A. Limiting the Reign of Discretion: Implementing a Baseline for Jurisdictional Abstention

Federal policy typically includes a baseline consideration for procedural and substantive decisions.[213] It logically follows that a choice affecting whether or not a case might be heard in a particular forum—or in some circumstances, heard at all[214]—should have at least a similar regulatory filter.[215] Despite the seemingly

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[210] *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. REV. 543, 546-47 (1985) (explaining that courts have often used principles of equity, policy, and federalism to refrain from exercising jurisdiction despite the lack of an apparently endowed power from the legislature to do so).

[211] *See Id.* at 546 ("[t]he scope of judicial discretion in jurisdictional matters is remarkably broad and far-reaching). *See also* Fed. R. Civ. P. 6(b), 13(f), 15(a), 24(b), 26(c), 39(b).

[212] Balzano, *supra* note 204, at 5 (noting the "grab bag" of considerations that is currently applied in light of "comity concerns").

[213] Take, for example, the relevance rule of federal evidence. Fed. R. Evid. 401, 402. Before evidence faces any harsher analysis, such as the inquiry into its prejudicial value or its acceptability under the hearsay rule, exclusions, and exceptions, evidence must be relevant to the issues being litigated to be considered admissible. Fed. R. Evid. 403, 801-07. While relevance is a low bar in federal evidence, it is still the gate that prevents a complete presumption of admissibility. *See* Barret J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1925 (2012).

[214] While domestic courts are typically adamant about ensuring the adequacy of an alternative forum before dismissing an action, a forum's sufficiency does not make it remedy available to parties who have limited financing, travel capabilities, access to resources, etc. *See* De Melo v. Lederle Laboratories (8th Cir. 1986) (dismissing a plaintiff's action in favor of Brazil as a forum regardless of the plaintiff's inability to acquire legal representation and the significant decrease in possible damages for a serious injury of permanent blindness).

[215] *See* Shapiro, *supra* note 211, at 574.

intuitive nature of this concept, throughout history, jurisdiction has been a completely open field of judicial discretion, with no clear guidepost.[216] Leaving this power unchecked could result in monumental inequity involving American litigation; in fact, some even contend that courts "*must* resolve all controversies within their jurisdiction because the alternative is chaos."[217] Though it is a valid concern, a strict approach requiring courts to undertake every case for which they hold subject matter jurisdiction misunderstands the role of federal courts and the purpose of jurisdictional leniency.[218] With this in mind, legislation should differentiate judicial discretion as "a power that carries with it an obligation of reasoned and articulated decision" from "an uncontrolled or whimsical power to decide like cases differently[.]"[219]

The best way to address the two sides of this argument and keep judicial discretion within the bounds of foreseeability and fairness is an express authority of the courts to reject jurisdiction where: (i) there is a real and substantial policy interest in favor of abstaining from exercising such jurisdiction, and (ii) the court provides, in its rationale, the reasoning behind favoring such a policy with a degree of specificity. Generally, it is expected that when a judge abstains from jurisdictional enforcement, it is in response to a separate procedural or policy concern, which requires deference and holds more weight than a party's right to litigate in a particular forum.[220] By restricting judicial preference and demanding a true and articulate motivation behind this kind of refusal to extend control over the subject matter of a conflict, courts will be focused on that purpose.[221]

Implementing the proposed legislative standard would merely codify an existing conceptual standard requiring judicial bodies to give considerable thought

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[216] *Id.* at 574-75. *See, e.g.*, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 504 (1971) (declining to exercise jurisdiction because an "interstate pollution case [is] an extremely awkward vehicle to manage"); Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942) (dismissing a case under the premise that that suit could "better be settled in the proceeding pending in state court").

[217] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS at 173 (1962) (emphasis added). *See also* Cohens v. Virginia, 19 U.S. 264, 404 (1821) (Chief Justice Marshall writing in dictum, "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would-be treason to the constitution.").

[218] *See* Shapiro, *supra* note 210, at 578.

[219] *Id.* at 579.

[220] *See id. See also* Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 842 (2008) (addressing the policy of jurisdiction abstention in the context of the *forum non conveniens* doctrine).

[221] *See* Shapiro, *supra* note 211, at 579.

and assessment to the presented case and the implications that handling such a matter would produce.[222] Particularly, courts should focus on the adequacy of alternative remedies, bounds of state and federal powers, interests of the other branches, convenience and efficiency of the anticipated forum, and interference with foreign governance or comity.[223] For example, where similar proceedings are already being managed at a state level, a federal court should decline to exercise jurisdiction in acknowledgement of that state's right to resolve its own conflicts.[224] Likewise, where a foreign sovereign has an interest in settling a dispute, courts must contemplate that interest in juxtaposition of the domestic counterpart.[225] Scrutinizing a decision made on the basis of this balancing test, nonetheless, can be a difficult task where details are scarce and the rationale seems to be applied arbitrarily.[226] Thus, the second factor in this baseline test provides for a deeper level of inquiry.

Codifying a substantial reason as a prerequisite for refusing jurisdiction will deter judges from applying this power loosely, demonstrating individual preference or ideology: it will create a more concrete and consistent standard for evaluations that have previously been left in large part to federal judges' absolute discretion.[227] Thus, by setting out this clear baseline structure for courts to abide by, Congress will take the first step towards clarifying the function of international comity and

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[222] *See* Shapiro, *supra* note 211, at 579 (noting an expected presumption in favor of asserting jurisdiction where the standards are met).

[223] *See id.* at 579-88 (1985).

[224] *See* Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501 (1941) (abstaining from jurisdiction in interest of "the rightful independence of the state governments"); Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563 (1939) (denying jurisdiction where the claim could be put forth "as a defense to the [state] action… or a cross-complaint" in state court).

[225] *Compare* Cooper v. Tokyo Elec. Power Co. Holdings, 960 F.3d 549 (9th Cir. 2020) (ruling that the foreign interest of Japan was greater than California's interest in compensating its residents for injury); *Freund*, 592 F. Supp. 2d at 570, 581 (finding that the interests of France in the case matter outweighed domestic concerns, which justified dismissal); Radeljak v. DaimlerChrysler Corp., 719 N.W.2d 40, 59-60 (Mich. 2006) (dismissing a case after taking into account the interests and adequacy of Croatia under *forum non conveniens*) *with* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1112 (5th Cir. 1985) (holding that Mexico's interests in resolving a commercial dispute were not so great as to outweigh the concern of protecting U.S. citizens from substantial financial harm); *Goss Int'l Corp.*, 491 F.3d at 363 (determining that, despite an obligation to foster comity, national interests outweighed that of Japan); Sutherland v. Kennington Truck Serv., 562 N.W.2d 466, 473 (Mich. 1997) (reversing dismissal on the grounds that Ontario did not have an interest in resolving a dispute where they would have applied Michigan law regardless).

[226] *See* Shapiro, *supra* note 211, at 546.

[227] *See, Wyandotte Chemicals Corp.*, 401 U.S. at 504 (rejecting jurisdiction simply because the case would be difficult to manage).

the FSIA. Further, with a more detailed holding and a thoughtful analysis, these judgments will be more easily reviewed for error on appeal and more difficult to overturn. The remaining issue is acclimation of international comity to this rule. If left as is, comity can be applied regardless of the interests presented on either side of a dispute, and even more, it can be denied without consideration. Therefore, a second, more rigorous test is necessarily triggered by the concept of comity.

B. The End of an Era: Restricting the Use of Discretion in Comity Evaluations

In evaluating the prevalence of international comity, it must be noted that the U.S. has a vital public policy interest in maintaining a strong international reputation and global connections.[228] With this in mind, comity is an important part of the U.S. legal system, and a meaningful contributor to global status.[229] In furtherance of this policy goal, Congress must codify a standard for courts to follow when the doctrine of international comity surfaces. It must also separate its procedure from the complexities of foreign immunity and the FSIA. Federal court jurisdiction should give way to international comity and dismiss an action where: (i) a foreign nation has a real and substantial interest in the resolution of the case matter, which outweighs that of the U.S.; (ii) the foreign nation is an adequate forum for litigation; and (iii) the U.S. has an interest in a continued relationship with the foreign sovereign. Affording a great weight to domestic interests, the new framework should also include a more specific avenue of relief for U.S. citizens as an exception to abstention. Specifically, where a claimant's cause of action arises

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[228] *See* Tatiana August-Schmidt, *et al.*, *Book Annotations*, 51 N.Y.U.J. INT'L L. & POL. 999, 1057 (2019) (discussing the implications of international reputation in foreign relations and global influence). Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEO. J. INT'L L. 303, 316 (2011) ("[T]he United States takes its international reputation seriously.").

[229] *Compare* Russ Schlossbach, *Arguably Commercial, Ergo Adjudicable?: The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 B.U. INT'L L.J. 139, 161 (2000) (stating that where little justification is required for the U.S. to exercise jurisdiction over a claim affecting a foreign sovereign, the "result would be unfair to litigants, embarrassing to the Executive Branch, and potentially damaging to international comity concerns and the reputation of the United States among nations") *with* Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International Law and Foreign Law in U.S. Constitutional Interpretation*, 21 BYU J. PUB. L. 1, 50 (2007) ("Taking international human rights norms into account serves foreign relations purposes by allowing the United States to maintain a position of leadership in international affairs [and] earn a 'good' reputation").

out of occurrences when the claimant was a U.S. citizen who has exhausted all remedies in an invested foreign forum to no avail, courts may not use international comity as a basis for abstention. Naturally, legislation with such an effect compels the legislature to explicate its intention.

1. Real and Substantial Interest

By requiring a real and substantial interest of the foreign forum that outweighs a domestic claim to jurisdiction, Congress would incorporate the balancing test that should be, and often is, considered when assessing international comity.[230] Comparable to the deep roots of comity in foreign relations, the "real and substantial"[231] language saturates common law in federal civil procedure and jurisdictional practices.[232] Moreover, including terms of art which are readily definable by existing law will make the statute easier to apply and will serve as a minimal prerequisite to the application of international comity.[233] In this way, the standard will operate to automatically reject frivolous contentions by foreign entities.[234] Even in light of a real and substantial interest, however, two states can have a sufficient stake in adjudicating a dispute.[235] Thus, the factor also requires

[230] *See Mujica*, 771 F.3d at 602 (balancing the interests between Austria and the U.S. in evaluating the application of comity abstention).
[231] In law, real is defined as "[a]ctual; genuine; true[,]" and substantial is defined as "material[,]" "real[,]" and "important[.]" *Real*, Black's Law Dictionary (11th ed. 2019); *Substantial*, Black's Law Dictionary (11th ed. 2019).
[232] *See, e.g.*, Grable & Sons Metal Prods. v. Darue Engineering & Manufacturing, 545 U.S. 308, 316 (2005) (demanding that laws involved in a federal question jurisdiction suit must be "sufficiently real and substantial" to the claim); Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460 (1980) (mandating that citizens whose diversity is used to meet citizenship diversity jurisdiction must be "real and substantial parties to the controversy"); Rosado v. Wyman, 397 U.S. 397, 403 (1970) (holding that federal question jurisdiction necessitates a "substantial federal question"); Newburyport Water Co. v. Newburyport, 193 U.S. 561, 576 (1904) (insisting that federal question jurisdiction include a "real and substantial" relation to questions of federal law); St. Joseph & G.I.R. Co. v. Steele, 167 U.S. 659, 662 (1897) (finding that federal question jurisdiction requires a "real substantive question").
[233] GEORGETOWN UNIVERSITY LAW CENTER, *A Guide to Reading, Interpreting and Applying Statutes* (2017), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf (noting that statutory language can be given meaning by common law that becomes widely accepted and understood).
[234] For example, in the renowned *Mottley* case, the Supreme Court ruled that an anticipated defense that addressed a federal law does not have a real and substantial connection to the cause of action as to provide for federal question jurisdiction. Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 154 (1908). Here, similar attenuated allegations that a foreign sovereign has an interest in settling a dispute would be filtered out by the plain language of the rule.
[235] *See* New Jersey v. New York, 283 U.S. 336, 342-43 (1931).

that a foreign forum's investment in a matter outweigh the domestic interests. Much like the preponderance of the evidence standard,[236] the balancing test would seek to find which state, as demonstrated by the evidence, has the superior interest, even if that interest weighs just a feather more than the other does.[237]

The question then becomes one of burden. Traditionally, the moving party bears the burden of proof.[238] Throughout the development of the common law, however, the U.S. has developed burden-shifting mechanisms[239] and divided burden into two distinct categories[240]: (i) burden of persuasion;[241] and (ii) burden of production.[242] The basic adversarial nature of the American legal system necessarily involves this particularity in the level and allocation of parties' responsibilities in litigation.[243] In many contexts, shifting the burden of production from one party to another can increase the efficiency of the judicial process and put the responsibility on the party that is better positioned to bring the necessary evidence.[244] Here, the basic

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[236] Preponderance of the evidence means "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force[.]" *Preponderance of the Evidence*, Black's Law Dictionary (11th ed. 2019). *See also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1510 (1999) (defining preponderance of the evidence as a standard in which "the balance of probabilities tilts only slightly in favor" of one party or the other).

[237] *See* Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 527 (1987) ("balance[ing] this interest in the protection of the United States citizens from harmful foreign products and compensation for injuries caused by such products against France's interest in protecting its citizens from intrusive foreign discovery procedures.") (citation and internal quotations omitted).

[238] *See* Maxwell O. Chibundu, *Delinking Disproportionality from Discrimination: Procedural Burdens as a Proxy for Substantive Visions*, 23 N.M.L. REV. 87, 113 (1993).

[239] Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2860 (1999) ("courts have created a variety of burden-shifting schemes in which the plaintiff and the defendant carry different burdens at different stages of civil litigation").

[240] *See id.* at 2882; *A Comparative Review of the Socio-Legal Implications of Burden of Proof and Presumptions to Deal with Factual Uncertainty*, 32 AM. J. TRIAL. ADVOC. 57, 61 (2012).

[241] The burden of persuasion refers to a party's need to convince the trier of fact that judgment should be made in their favor. *Id.* at 2886.

[242] The burden of production is merely the necessity to bring evidence refuting a certain legal presumption. *Id.* at 2887.

[243] Chulyoung Kim, *Adversarial and Inquisitorial Procedures with Information Acquisition*, 30 J. L. & ECON. 767, 777 (2014).

[244] Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986) ("This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party."). *See also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 327 (2009) (shifting the burden in regard to a defendant's Confrontation Clause objection); Rice v. Collins, 546 U.S. 333, 338 (2006) (shifting

presumption is that the burden of persuasion be placed on the party raising international comity.[245] Nevertheless, once a claimant has brought a showing of a real and substantial foreign interest, the burden of production would inevitably shift to the opponent of such a motion to show that the prevailing interest in adjudication is domestic.[246] Using this process will encourage the parties to exploit their resources and bring a greater quantity and quality of evidence to support their contention. It will also encourage the parties to further limit the standard to only evaluate the evidence made available through the litigation process, rather than turning to judicial discretion and reputation of foreign forums.[247] Through this more objective and directed test, discretion will cease to skew the boundaries of judicial power over jurisdiction in foreign cases.

2. Adequacy of the Forum

Directly sourced from the doctrine of *forum non conveniens*,[248] an adequacy constraint is essential to safeguarding domestic interests before dismissing an action in favor of a foreign forum.[249] Nonetheless, adequacy is an extremely lenient criterion to meet—a forum is only inadequate when "the remedy provided by [it] is

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burden in the context of juror striking); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) (applying a burden shift for disparate impact); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (same).

[245] Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 55 n.9 (1988) (demonstrating that the burden of persuasion never shifts from the moving party).

[246] Similar to the doctrine of *forum non conveniens*, the moving party has the burden of showing an adequate alternative forum, after which, the burden shifts to the other party to show why that forum is inadequate. *See* David Lee Mundy, *Using Transnational Tort to Combat Sex Trafficking and Sex Tourism*, 9 REGENT J. INT'L L. 247, 274 (2013).

[247] *See* Thomas Kallay, *Managing the Burdens Imposed on Motions for Summary Judgment in California: The 1992 and 1993 Amendments to CCP 437C*, 41 SANTA CLARA L. REV. 39, 49 (2000) (discussing how a burden of proof incites parties to bring a certain "quantity of evidence"); James P. McBaine, *Burden of Proof: Presumptions*, 2 UCLA L. REV. 13, 19 (1954) (differentiating a mere quantity of evidence from the quality it has to convince the mind).

[248] While the doctrine of international comity as proposed has similarities to *forum non conveniens*, they are two entirely different concepts. *Forum non conveniens* focuses on convenience of the litigation forum, foreign relations are central to international comity. *Compare* Loya v. Starwood Hotels & Resorts Worldwide, Inc., 583 F.3d 656, 666 (9th Cir. 2009) ("convenience is the central focus of the *forum non conveniens* inquiry") *with Goss Int'l Corp.*, 491 F.3d at 361 n.4 (focusing on whether abstaining from jurisdiction "threaten[ed] a vital United States policy").

[249] *See* Peter J. Carney, *International Forum Non Conveniens: "Section 1404.5*, 45 AM. U.L. REV. 415, 477 (discussing the policy implications of the adequacy and effectiveness of foreign forums).

so clearly inadequate or unsatisfactory that it is no remedy at all."[250] Thus, Congress will prohibit the application of international comity in cases where foreign sovereigns with a greater interest in the case refuse to adjudicate, unreasonably delay litigation,[251] or fundamentally fail to offer a remedy[252] to the aggrieved party. Certainly, by preserving domestic interests that protect U.S. citizens, the adequacy doctrine also functions to support individual litigants' rights.[253]

Contrary to the reciprocity doctrine, adequacy does not account for a forum's willingness to return comity. Instead, it leans in favor of the Third Circuit's approach in promoting international relations and reputation regardless of foreign state engagement.[254] Indeed, foreign sovereigns reciprocating acts of comity would benefit the U.S., but foreign relations cannot always be built on the foundation of equal trade. Take for example, the American Revolution—France backed the colonies with minimal assurance of future reciprocity.[255] Decades later, France and the U.S. formally bonded their allegiance, creating a relationship has remained pervasive throughout modern years.[256] International relations are a complex and fragile subject, but, as history has shown, affording a level of respect to other nations can produce an incredible return.[257] The U.S. may not find a direct return

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[250] *Piper Aircraft Co*., 454 U.S. at 254. *See also* Finity E. Jernigan, *Forum Non Conveniens: Whose Convenience and Justice?*, 86 TEX. L. REV. 1079, 1091-92 (2008).

[251] *See* Bhatnagar by Bhatnagar v. Surrendra Overseas, 52 F.3d 1220, 1227 (3d Cir. 1995) (holding that extreme delay is a basis to deem a forum inadequate).

[252] It is important to note that an alternative forum providing for a significantly reduced recovery value does not make that forum inadequate. De Melo v. Lederle Laboratories, 801 F.2d 1058, 1061 (8th Cir. 1986).

[253] Megan Waples, *The Alternative Adequate Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1518 (2004) (dictating that a "serious assessment of the adequate alternative forum is essential" because in its absence, legal doctrines do not work as intended—"to protect that parties and the interests of justice").

[254] *Somportex Ltd*., 453 F.2d at 435.

[255] Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 413 (2012) ("France was conducting an offensive war" in aid of the United States, who "was not bound to honor [a] guarantee because it was in a defensive alliance").

[256] Dana Zartner Falstrom, *French and American Perspectives Toward International Law and International Institution*, 58 ME. L. REV. 337, 368 n.159 ("France and the United States have… always stood together and have never failed to be there for one another") (citation and internal quotations omitted).

[257] *See, e.g.*, North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Charter of the UN and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 (1945).

of comity where they do not evaluate reciprocity, but the value of exercising comity comes in the strength of international relationships.[258]

3. Interest in International Relationships

The concept of reciprocity should be considered in evaluating comity, or the U.S. will risk engaging in unbalanced relationships with foreign countries. Surely, the U.S. should not be forced to give deference to states which fail to engage in any amicable communications at all.[259] Predicting these issues of foreign diplomacy, the rule enacted by Congress would include an element regarding domestic interests in maintaining a relationship with a foreign state. Regardless, the provision becomes a low bar when looking at the expansiveness of U.S. foreign diplomacy today.[260] The U.S. currently maintains an abundance of treaties and agreements with foreign nations.[261]

When addressing the third element of the comity legislation, courts only need to do so briefly, as the provision merely requires an interest in preserving a relationship with a foreign nation.[262] Notwithstanding the simplicity of this factor, it is vital to separate out those sovereigns that have persistently aggravated the international community, specifically the U.S.[263] Failing to do so may not only reward countries who have wronged the U.S., but may also offend other nations with which the U.S. retains a working relationship.

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[258] Laura M. Salva, *Legislative Reform: Balancing Comity With Antisuit Injunctions: Considerations Beyond Jurisdiction*, 20 J. LEGIS. 267, 269 (arguing that international comity promotes international commerce, effects transnational intercourse, and increases the likelihood that domestically rendered judgments will be upheld abroad).

[259] For example, the U.S. cut ties with Iran in April of 1980 after a hostage crisis in the American Embassy in Tehran, and tensions between the two countries have been growing ever since. Therefore, it is likely not in the best interest of the U.S. presently to afford the Iranian judiciary gestures of comity. *See* John Davison, *Threat to Evacuate U.S. Diplomats from Iraq Raises Fear of War*, THOMSON REUTERS (Sep. 28, 2020 at 8:44am), https://www.reuters.com/article/usa-iraq-iran-int-idUSKBN26J1Z4.

[260] *See generally U.S. Bilateral Relations Fact Sheets*, UNITED STATES DEPARTMENT OF STATE (updated Nov. 5, 2020), https://www.state.gov/u-s-bilateral-relations-fact-sheets/.

[261] *Id.*

[262] *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 679 (2002) (noting that knowledge of international affairs is commonplace knowledge within the federal courts system).

[263] *See, e.g.*, *Sanctioned Destinations*, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations.

The allocation of the burden to meet this component, then, is the only remaining issue with this provision. The federal court system has a familiarity with global affairs and the interactions of foreign relations.[264] However, promoting a more objective standard and the end of discretion's tyranny,[265] a decision must be made only upon evidence brought by the parties.[266] Consequently, under the presumption of burden allocation, the movant must be responsible for bringing evidence that the U.S. has an existing interest in maintaining an ongoing relationship with the foreign sovereign.[267] Once the moving party has met this burden, the opposing party bears the burden of presenting evidence that no interest exists in diplomacy with the proposed state.[268] As aforementioned, the bar here is low, and should be treated as such.

4. Prudential Exhaustion of Foreign Remedies

The public policy offered in case law introduced the idea of "prudential exhaustion"[269] in international comity decisions. But, in *Simon*, the D.C. Circuit conflated the issue of comity, claiming it was precluded by the FSIA.[270] The proposed legislation will prevent this type of miscalculation in the future. Comity is a tool that grants foreign states the opportunity to redress conflicts within their own sovereignty, but an exception based on prudential exhaustion gives foreign entities the chance to do exactly that while retaining the capacity to reexamine the

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[264] *See* Spiro, *supra* note 262, at 679 (discussing the federal courts' expanding understanding with foreign affairs through the process of globalization).
[265] *See* Merle H. Weiner, *"We Are Family": Valuing Associationism in Disputes Over Children's Surnames*, 75 N.C.L. Rev. 1625, 1765 (proposing a legal solution in children's name changes to "narrow the parameters in which [judicial] discretion can operate, thereby helping to constrain judicial bias").
[266] *See* Stephen F. Ross & Daniel Tranen, *The Modern Parole Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 234 (1998) (arguing that replacement of legislative intent with judicial discretion is encouraged by the exclusion of evidence).
[267] *See* Weeks v. Michigan Department of Cmty. Health, 587 Fed. Appx. 850, 854 (6th Cir. 2014) (ruling under Fed. R. Civ. P. 56(a), the movant has the burden to show the lack of genuine dispute to material fact); Adamson v. Multi Cmty. Diversified Servs., 514 F.3d 1136, 1145 (10th Cir. 2008) (same).
[268] *See Burdine*, 450 U.S. at 254 (finding that once a presumption of persuasion is met, a defendant will bear the burden of going forward with the evidence).
[269] *Fischer*, 777 F.3d at 858.
[270] Simon IV at 1181.

issue should the foreign entity not provide adequate relief.[271] In fact, the same obligation has been demonstrated by the U.S. legal system in several different contexts in the past.[272] Further, when dismissing a case on international comity grounds, a judge must be required to do so "without prejudice," and as a result, leave the courtroom doors open should the party find themselves without redress in alternative forums.[273]

"One of the time-honored principles of customary international law has been that before a State can pursue, or 'espouse,' the claim of one of its nationals, the injured party must be shown to have exhausted its local remedies in the host State first."[274] In fact, even the International Court of Justice found that claims involving foreign nations mandate this same exhaustion.[275] By applying the exhaustion technique that is already used so broadly, including in the U.S. itself, Congress will be pulling the best of the two worlds together—meeting the expectations of foreign diplomacy and caring for its own interests in protecting its citizens and providing them with an opportunity for their day in court.[276]

This prong, however, raises an important distinction between those claims in which the U.S. is invested in a claimant's relief and those which are truly a product of foreign action.[277] In the absence of this provision, a foreign entity may fail to

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[271] Ghatan, *supra* note 125 at 1295 (showing that prudential exhaustion is a tool used for gatekeeping that does not entirely preempt litigation). *But see* Noe Hamra Carbajales, *Cassirer v. Kingdom of Spain: Did the Exhaustion of Remedies Doctrine Find Its Way into Claims Under the Foreign Sovereign Immunities Act?*, 18 TUL. J. INT'L & COMP. L. 539, 555 (2010) (arguing that prudential exhaustion shuts the door on litigation opportunities in the U.S.)

[272] *See, e.g.*, TVPA (codified as amended at 28 U.S.C. § 1350 note (2012)) (implementing an exhaustion of remedies provision); Restatement (Third) of Foreign Relations Law of the United States § 713, cmt. f (providing for abstention of a claim involving a foreign entity when the claimant has not exhausted foreign remedies); Millicom Int'l Cellular, S.A. v. Republic of Costa Rica, 995 F. Supp. 14, 23 (D.D.C. 1998) (requiring exhaustion before allowing the application of the Expropriation Exception of the FSIA); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW) at *10 (S.D.N.Y. Feb. 28, 2002) (applying the exhaustion requirement for violations of citizens' rights by oil companies in Nigeria).

[273] *Fischer*, 777 F.3d at 865-66 (dismissing without prejudice); Abelesz v. Magyar Nemzeti Bank, No. 10 C 1884, 2013 U.S. Dist. LEXIS 124905 at *2 (N.D. Ill. Aug. 20, 2013) (same).

[274] Matthew H. Adler, *The Exhaustion of the Local Remedied Rule After the International Court of Justice's Decision in ELSI*, 39 INT'L & COMP. L. Q. 641 (1990).

[275] *Elettronica Sicula S.p.A. (ELSI)*, United States v. Italy, Judgment, 1989 I.C.J. Rep. 15, ¶ 46 (July 20).

[276] *Turner Entertainment Co.*, 25 F.3d at 1522, 1523 (exercising international comity and ensuring their citizens an opportunity to litigate by applying an exhaustion requirement).

[277] *See generally* C. P. Jhong, *Application of Common-Law Doctrine of Forum Non Conveniens in Federal Courts After Enactment of 28 U.S.C.A. § 1404(a) Authorizing Transfer to Another District*, 10 A.L.R. Fed. 352.

render a judgment, erroneously deny a remedy despite its admitted fault, or use an inappropriate body to assert a decision, all of which would deny a plaintiff's right to due process. Specifically for U.S. citizens, it is important that the American judiciary provide a litigative option under such circumstances, and thus, where the U.S. citizen plaintiff has prudentially exhausted foreign remedies to no avail, domestic courts should hear the case.[278] In *Simon*, the plaintiffs' claims demonstrate two limits to the application of this rule: (i) where parties joined to an action who are not U.S. citizens, their claims must be severed; and (ii) where claims arose from occurrences before the claimants were U.S. citizens, those claims do not fall within the exception.[279] Under this regime, the ten plaintiffs in *Simon* who are not U.S. citizens would have to be severed from the case because the U.S. does not have an in interest in resolving those disputes or protecting foreign nationals.[280] In fact, by taking these actions, the U.S. would be acting as the world police, a position which the U.S. has rejected severally in the past.[281] Furthermore, the four remaining plaintiffs in the *Simon* action would be without recourse in the American judiciary as well, because the claims in question did not arise from a point in time in which they were citizens of the U.S.[282] Following the same logic, the U.S. cannot assert a particular interest in protecting a foreign citizen, and therefore, claims that arose when these plaintiffs were not U.S. citizens would have no business finding themselves in a U.S. court.

CONCLUSION

By misguidedly conflating the FSIA as a preemption to the use of international comity, the D.C. Circuit created a massive discrepancy within the law.[283] That judgment was in error. The Seventh Circuit applied international comity appropriately, requiring exhaustion of remedies in the foreign country where the

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[278] Curtis, *supra* note 197, at 1684.
[279] *See generally* Simon IV.
[280] *Id.* at 1181.
[281] Stephanie M. Chaissan, *"Minimum Contacts" Abroad: Using the International Shoe Test to Restrict the Extraterritorial Exercise of United States Jurisdiction Under Maritime Drug Law Enforcement Act*, 38 U. MIAMI INTER-AM. L. REV. 641, 665 (2007); Uri Friedman, *How Geography Explains Donald Trump and Hillary Clinton*, THE ATLANTIC (Oct. 13, 2016), https://www.theatlantic.com/international/archive/2016/10/anders-fogh-rasmussen-trump/503468/.
[282] Simon IV at 1181.
[283] *Id.*

claims arose.[284] As for *Simon*, where only four of fourteen plaintiffs are U.S. citizens—a status which they only gained several decades after the allegations arose—and all the alleged harm occurred in another state—a state that has yet to deny claimants recourse—it makes little sense to adjudicate this multi-billion-dollar litigation in the U.S.[285]

While executive agreements, use of arbitration, and trust funds can all be useful tools *ad hoc* for this type of matter,[286] none of them will completely rectify the fracture in the law. Thus, Congress must intervene. First, as most federal policies recognize,[287] judicial discretion regarding jurisdiction necessitates a baseline rule to filter out individual biases and beliefs. Second, Congress has a duty to clarify its legislative intent with the FSIA and divorce from it the concept of comity in favor of its own legislation. Executing this legislative action will cure the war between circuits and bring the D.C. courts back to the same page.

The Holocaust was described by Winston Churchill as "greatest and most horrible crime ever committed in the history of the world[,]"[288] but unfortunately, the law does not have special remedies for wicked acts—dreadful acts—like those of the Nazi regime. The best course of action for the U.S. is to correct its oversight before the plaintiffs in *Simon*, and the many plaintiffs similarly situated that inadvertently forego an opportunity to pursue adequate remedies elsewhere. Congress has the opportunity here to mend a split it left in the law before more courts like the D.C. Circuit expand the gap of error.

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[284] *Fischer*, 777 F.3d at 847; *Abelesz*, 695 F.3d at 655.
[285] *See* Simon IV at 1181.
[286] Tenkhoff, *supra* note 207, at 599-603 (providing a piecemeal solution to the full-meal comity problem).
[287] *See, e.g.*, 28 U.S.C. § 1332(a) (demanding a minimum amount in controversy for diversity jurisdiction); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1454) (requiring minimum diversity in class action suits); Fed. R. Civ. Proc. 20(a)(1) (necessitating claims from the same case with a common question for joinder); Fed. R. Evid. 401, 402 (setting a bar of minimum relevance for admissibility).
[288] Simon IV at 1190.