EXHAUSTION AS AN EMERGING PRINCIPLE

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Abstract

Domestic courts in the United States are increasingly encountering cases that may satisfy jurisdictional hurdles, but are "foreign" in nature. These cases, which often involve some combination of foreign plaintiffs, defendants, and facts, implicate the judiciary in questions of foreign relations normally handled by the Executive and Legislative Branches. This Note argues that judges should require plaintiffs to "exhaust" remedies in foreign forums that are more closely connected to their cases. Rather than dismiss these cases outright, however, judges can and should stay these proceedings in the interim. This Note first explores the doctrine of exhaustion as it currently exists in both international and domestic law. It then presents a new approach to exhaustion, which would allow judges to use a multi-factor test to decide whether to stay a case that touches heavily upon foreign relations issues. Part IV addresses an argument that the Foreign Sovereign Immunities Act may foreclose this novel approach. Additional concerns about requiring extra-textual exhaustion are addressed in Part V. Part VI presents a case study of this judicial solution based on Simon v. Hungary, 37 F. Supp. 3d 381 (D.D.C. 2014). The emerging concept of exhaustion presented in this Note could redirect cases that are only marginally connected to the United States towards more suitable forums, thus reducing foreign policy friction.

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I. INTRODUCTION

In the 2018 term of the U.S. Supreme Court, at least four cases touched upon issues that heavily involved other nations. In *United States v. Microsoft Corporation*, the Court considered whether a U.S. warrant may compel a U.S. provider of email services to disclose data stored abroad.[1] In *Animal Science Products v. Hebei Welcome Pharmaceutical Co. Ltd.*, the Court decided how much weight should be given to a foreign government's submission under Federal Rule of Civil Procedure 44.1.[2] In *Rubin v. Iran*, the Court construed a section of the Foreign Sovereign Immunities Act ("FSIA") to limit attaching and executing against the property of a foreign country unless certain conditions were met.[3] In *Jesner v. Arab Bank, PLC*, the Court decided whether foreign corporations could be defendants under the Alien Tort Statute ("ATS").[4]

Despite the fact that each of these cases involved different statutes, the international nature of these cases unified seemingly disjointed areas of law. In his book *The Court and the World*, Justice Stephen Breyer described a week during a recent October in which two of the six cases that the Supreme Court heard involved foreign activity. He remarked, "[t]he fact of two such 'foreign' cases out of the six cases argued that week would have been surprising when I first joined the Court nearly twenty years ago. But it is no longer unusual. More and more, cases before the Court involve foreign activity."[5]

Two factors are important to the rise of international cases in U.S. courts: globalization and the attractiveness of U.S. forums to foreign litigants.[6] In the seminal case *Piper Aircraft Co. v. Reyno*, Justice Thurgood Marshall cited jury trials and large damages awards as two procedural reasons why U.S. forums are so favored.[7] Lord Tom Denning, a British

1. United States v. Microsoft Corp., 138 S. Ct. 1186 (2018).

2. Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018); FED. R. CIV. P. 44.1.

3. Rubin v. Iran, 138 S. Ct. 816 (2018).

4. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

5. STEPHEN BREYER, THE COURT AND THE WORLD 3 (2015).

6. *Id.* at 147–48 ("Meanwhile, the rules of the American judicial system are, compared to those of many nations, favorable to plaintiffs, and the expenses of litigation can impose pressure on defendants to settle.").

7. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981).

judge, explained, "as a moth is drawn to the light, so is a litigant drawn to the United States."[8]

Considering the attractiveness of U.S. courts in the midst of a globalized world, what challenges do these cases bring? Cases involving foreign sovereigns, foreign parties, and foreign actions present the judiciary with questions without clear answers. What branch of the U.S. government should take the lead in foreign policy? How should the U.S. judiciary value competing legal regimes? Should the judiciary modernize legislation that is out of touch with the present moment? How expansively should courts consider "U.S. interests"?

During oral arguments for *United States v. Microsoft Corporation*, Justice Ruth Bader Ginsburg remarked upon how the world had advanced since the law at hand was passed. She queried, "[s]o wouldn't it be wiser just to say let's leave things as they are; if—if Congress wants to regulate in this brave new world, it should do it?"[9] With the quagmire of legal issues that these international cases involve, perhaps this "hands-off" approach may be the wisest. In fact, "deference," whether to the U.S. Congress or foreign sovereigns, seems to be the favored approach. Consider that in *Animal Sciences*, the Court decided to afford a foreign government's submission "respectful consideration,"[10] and in *Rubin v. Iran*, the Court interpreted the FSIA in a way that is *more* protective of foreign sovereigns.[11] In *Jesner v. Arab Bank, PLC*, the Court refused to hold corporations liable under the ATS without action from the political branches of government, citing the need for "judicial deference."[12]

The problem with these rulings is a lack of clarity regarding which tools the judiciary should use, a point which Justice Sonia Sotomayor's dissent makes in *Jesner*. Justice Sotomayor argued that courts have a number of tools at their discretion to use when a case implicates international concerns.[13] Courts can use the presumption against extraterritoriality, the recently restricted standard of general jurisdiction from

8. Smith Kline & French Laboratories Ltd. v. Bloch [1983] 2 All ER 72 at 74 (Eng.). *See generally* ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 28 (2003) ("If it is the case that procedural advantages offered by particular forums provide, above all else, the incentive for forum shopping, then there can be little doubt that the United States is the most attractive destination for the forum shopping plaintiff, especially one with an action in tort."); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 3–4 (6th ed. 2018).

9. Transcript of Oral Argument at 6, United States v. Microsoft Corp., 138 S. Ct. 1186 (2018).

10. Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018).

11. Rubin v. Iran, 138 S. Ct. 816, 820 (2018).

12. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018).

13. *Id.* at 1430 (Sotomayor, J., dissenting).

Daimler AG v. Bauman,[14] exhaustion, *forum non conveniens*, comity, or the opinion of the State Department.[15] Justice Sotomayor described the majority's approach as using "a sledgehammer to crack a nut."[16] Her point that the majority's approach may be overinclusive is well taken. However, Justice Sotomayor's laundry list of available tools creates a standard that is unmanageable and overinclusive.

A doctrine of exhaustion may be a partial solution to the challenges of deciding cases involving foreign sovereigns. Exhaustion is a middle approach between the two extremes illustrated in *Jesner*: blanket rules foreclosing any remedy in U.S. courts and an unworkable number of tools. A doctrine of exhaustion, invoked in cases in which one party is a foreign sovereign, would serve a variety of interests while still providing for clarity and manageability.

This Note has five parts. Part I introduces the varied forms of exhaustion that appear in both international and domestic courts. Part II presents the doctrine of exhaustion and its advantages. Part III explains why the FSIA does not foreclose the use of exhaustion. Part IV addresses potential concerns that some may have about implementing this doctrine. Part V presents a case study based on *Simon v. Hungary*,[17] a case which the Supreme Court granted petition for certiorari in July 2020.[18]

II. Exhaustion in International and Domestic Courts

Exhaustion is a court's decision to require a party seeking a remedy to first go to a different forum to resolve the dispute. Exhaustion of remedies is a familiar topic in both domestic and international law. In a domestic sense, statutory requirements mandating exhaustion and *forum non conveniens* require plaintiffs to seek remedies in another forum.[19] In international law, customary law requires that nations exhaust domestic remedies on behalf of their citizens before pursuing claims in international tribunals.[20] Additionally, several international

14. Daimler AG v. Bauman, 571 U.S. 117 (2014).

15. *Jesner*, 138 S. Ct. at 1430–31 (Sotomayor, J., dissenting).

16. *Id.* at 1431 (Sotomayor, J., dissenting).

17. 37 F. Supp. 3d 381 (D.D.C. 2014).

18. Hungary v. Rosalie Simon, 911 F.3d 1172 (D.C. Cir. 2018), *cert granted*, 2020 U.S. LEXIS 3533 (July 2, 2020) (No. 18-1447).

19. *See infra* Section II.A.

20. Interhandel (Switz./U.S.), Judgment, 1959 I.C.J. Rep. 6, 27 (Mar. 21) [hereinafter Interhandel case]; Chittharanjan Felix Amerasinghe, Local Remedies in International Law 3 (2d ed. 2005); Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 Chi. J. Int'l L. 403, 431 (2016) ("International law

organizations have incorporated local remedy exhaustion as a requirement to access their judicial bodies.[21]

A. *Exhaustion in Domestic Law*

In the United States, the federalist system of government provides ample ground for the use of doctrines such as abstention and exhaustion. Justice Joseph Story, in his *Commentaries on Conflict of Laws*, spoke of two types of comity: "comity of courts" and "comity of nations."[22] The comity of nations is the voluntary respect and courtesy shown to courts of other nations.[23] The comity of courts occurs when "judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere."[24] It is this iteration of comity that can be observed in the domestic sphere and that motivates the use of abstention and exhaustion. The following examples illustrate how the deference of one court to another furthers the goals of comity and expediency.[25]

The requirement of exhaustion of state remedies is longstanding in criminal law. The Supreme Court cited comity and convenience as justifications for its decision to "decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of a State."[26] Decades later, Congress codified the exhaustion requirement in 28 U.S.C.S. § 2254(b).[27] The Court in *Rose v. Lundy* traced the origins

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has an exhaustion requirement only with respect to cases before an international tribunal."); *see infra* II.B.

21. AMERASINGHE, *supra* note 20, at 303 ("The rule of local remedies has been expressly incorporated, as has been seen in Chapter 3, in the European Convention on Human Rights (ECHR), the American Convention on Human Rights (the 'American Convention') and the International Covenant on Civil and Political Rights (ICCPR).").

22. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS §38 (1834).

23. *Id.*

24. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993).

25. The listed examples are illustrative, not exhaustive. Exhaustion of administrative remedies is another example, for example in the Freedom of Information Act. 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.").

26. Prentis v. Atl. Coast Line Co., 211 U.S. 210, 229 (1908).

27. 28 U.S.C. § 2254(b)(1)(A) ("(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State"); Rose v. Lundy, 455 U.S. 509, 515 (1982) ("The exhaustion doctrine existed long before its codification by

of the exhaustion requirement, citing comity as a motivating concern.[28] However, the principle purpose of the requirement was to preserve the role of state courts as an enforcer of federal law and to avoid disrupting state judicial proceedings.[29] Additionally, the Court argued that requiring exhaustion of state claims would reduce piecemeal litigation and result in only a single habeas petition before the federal court, allowing for "a more focused and thorough review."[30]

The advantages of exhaustion requirements at the domestic level provide ample opportunity for comparison with exhaustion in international cases.

B. *Exhaustion in International Law*

The rule that a party must exhaust domestic remedies prior to pursuing relief before an international tribunal is well established as customary international law.[31] The rule's status as law is unquestioned and has been affirmatively confirmed in diplomatic practice.[32] However, the customary international law requiring exhaustion of domestic remedies does not extend to domestic courts, *only* international ones.[33] Despite arguments that this principle should apply in domestic forums,[34] the only customary international law that the International Court of Justice has recognized speaks to international forums.[35] The *Interhandel* case explained, "*[b]efore resort may be had to an international court in such a situation*, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[36] Global practice shows that certain organizations have also expressly incorporated the rule into their

Congress in 1948. In *Ex parte Royall*, 117 U.S. 241, 251, 6 S. Ct. 734, 740, 29 L. Ed. 868 (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act . . . ").

28. *Rose*, 455 U.S. at 515.

29. *Id.* at 518.

30. *Id.* at 520.

31. Interhandel Case, *supra* note 20; AMERASINGHE, *supra* note 20, at 3.

32. AMERASINGHE, *supra* note 20, at 3.

33. Curran, *supra* note 20, at 431 ("International law has an exhaustion requirement only with respect to cases before an international tribunal.").

34. Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 89 (D.D.C. 2014) ("The Court's remark came in response to a European Commission amicus brief that suggested it was a rule of international law that plaintiffs exhaust domestic remedies before suit could be brought in foreign courts for violations of customary international law.").

35. Interhandel Case, *supra* note 20 (emphasis added).

36. Interhandel Case, *supra* note 20, at 27.

founding treaties and covenants.[37] For example, the European Convention on Human Rights declares, "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law . . . ."[38] The American Convention on Human Rights and the International Covenant on Civil and Political Rights possess nearly identical language.[39]

Because this international law does not extend to domestic courts, the justification for courts requiring exhaustion comes not from a binding requirement of law, but from the many advantages of the approach. One of the justifications for the rule is respect for the sovereignty of the state where the claim "arose." The country "should have the opportunity of doing justice in its own way and of having an investigation and adjudication by its own tribunals upon the issues of law and fact which the claim involves . . . ."[40] The theory supporting this position is one based in an understanding of the inherent powers of sovereignty, rather than some independent notion of justice in the international order.[41] The rule of exhaustion also takes into account the interests of the plaintiff, the plaintiff's home state, and the global community.[42] Ultimately, however, the interests of the country asking for exhaustion are most heavily weighted.[43]

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37. AMERASINGHE, *supra* note 20, at 303 ("The rule of local remedies has been expressly incorporated, as has been seen in Chapter 3, in the European Convention on Human Rights (ECHR), the American Convention on Human Rights (the 'American Convention') and the International Covenant on Civil and Political Rights (ICCPR).").

38. Convention for the Protection of Human Rights and Fundamental Freedoms, *amended by* Protocols Nos. 11 and 14, art. 35, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

39. American Convention on Human Rights, art. 46(a), *adopted* Nov. 22, 1969, 1144 U.N.T.S. 143 ("that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law . . . "); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 41(c), *adopted* Dec. 16, 1966 ("The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law.").

40. AMERASINGHE, *supra* note 20, at 59.

41. *Id.* at 62.

42. *Id.* at 61–62.

43. *See id.* at 62–63 ("Basically, the rule is a recognition of the sovereignty of the host state in so far as such state is in reality being permitted to settle through its own organs a dispute of an international nature to which it is a party. This approach is supported by the fact that the rule seems to have become entrenched in response to an insistence by host states on powers founded on sovereignty rather than because it emanated from a basic principle of justice inherent in the international legal order. Perhaps also of importance is the acceptance given to the rule without protest by national states of aliens, clearly because they found it a practical rule in terms of their

III. Exhaustion Advantages

Courts in the United States should adopt a consistent standard when facing cases that have significant connections to other countries. U.S. courts should consider requiring plaintiffs to exhaust the remedies of another forum when faced with cases that involve foreign sovereigns. The factors that should influence the decision to impose an exhaustion requirement are: comity, the extent of the U.S. connection to the case, the opinion of the political branches, and the futility of foreign remedies. A balancing test of those factors should inform whether to require exhaustion of remedies in another forum. If a court imposes an exhaustion requirement, it should not dismiss the case. Rather, the court should stay the proceedings so that a plaintiff may return without prejudice if the foreign remedy is denied or insufficient. This approach has a number of advantages, including respecting the sovereignty of other nations, deferring to the judgment of the political branches in the area of foreign relations, and reducing international friction.

The concept of comity is central to this analysis. International comity signifies "the respect one nation should pay to the government interests of other nations."[44] Comity is an unavoidable concept when cases involve international interests, especially foreign sovereigns. In an early discussion of the doctrine, the Supreme Court explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[45]

The Eleventh Circuit has described comity as a doctrine of abstention.[46] A court recognizes that it possesses jurisdiction, but

own non-involvement in disputes arising from the problems of their nationals in their relations with other states.").

44. Samuel Estreicher & Thomas Lee, *In Defense of International Comity*, 93 S. Cal. L. Rev. 169, 170 (2020).

45. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

46. Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004) ("It is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum. . . . The district court dismissed this case on international comity grounds in favor of resolution at the Foundation because the Foundation is a specialized system, supported by the United States government and the international community, for addressing Nazi era claims.").

acknowledges that another forum should hear the case.[47] In the context of exhaustion, the doctrine of comity serves at least two interests: it demonstrates respect for foreign tribunals, which the United States hopes to receive in a reciprocal fashion, and it reduces international friction.

Justice Breyer, in his concurrence in *Sosa v. Alvarez-Machain*, specifically addressed these concerns. He explained that comity concerns arise when foreign persons who have been injured in other countries bring claims to U.S. courts.[48] Sovereigns generally limit the application of their law to "help ensure that 'the potentially conflicting laws of different nations' will 'work together in harmony,' a matter of increasing importance in an ever more interdependent world."[49] Failing to respect another nation's sovereignty may actually undermine the goal of international harmony.[50] Because exhaustion may prevent international conflicts, this approach could actually promote U.S. interests .[51]

Exercising jurisdiction over a foreign sovereign creates an opportunity for international friction or foreign relations difficulties. Exhaustion helps mitigate these potential challenges because it reduces the number of cases that U.S. courts will actually hear. Rather than immediately hear cases involving foreign sovereigns, the doctrine directs them back to forums that have the most significant connection to the controversy.

The Supreme Court has indicated that U.S. courts should be cautious when decisions might have collateral effects on foreign relations. According to the Court in *Sosa*, the possibility of "collateral consequences" in foreign relations "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[52] In another case considering the FSIA, the Court also advised deferring to the most recent decisions of the political branches of government.[53] These statements reflect the view that

47. *Id.*

48. Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004).

49. *Id.*

50. *Id.*

51. Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1053 (2d Cir. 1996) ("It should be remembered that the interest of the system as a whole—that of promoting 'a friendly intercourse between the sovereignties,' *Hilton*, 159 U.S. at 165—also furthers American self-interest, especially where the workings of international trade and commerce are concerned.").

52. *Sosa*, 542 U.S. at 727.

53. Austria v. Altmann, 541 U.S. 677, 689 (2004).

the Court should respond to the leadership of the political branches in foreign affairs, rather than make policy.

Exhaustion incorporates this notion by including the views of the political branches as a factor. If these branches are silent, exhaustion is the best option because it avoids signaling that U.S. courts do not trust the foreign sovereign to do justice. Moreover, it avoids having a U.S. court stand in judgment over the merits of a case involving a foreign sovereign.[54] If the political branches do have a designated policy regarding the litigation, then tailoring the ruling of the judiciary to the other branches using exhaustion avoids undermining their policies. For example, in *Freund*, the Southern District of New York abstained from deciding the plaintiff's claims because it did not believe "that federal courts possess greater aptitude than both the Executive and the French government to compensate Holocaust victims for atrocities committed by other foreign states, which occurred outside United States borders."[55] In that case, the court recognized that its competency in resolving the practical issue was less than that of the Executive Branch.

One concern in cases involving foreign sovereigns is that the connection to the United States may be *de minimis*, especially when the events giving rise to the claim occurred abroad. U.S. courts should be cautious when deciding whether to hear claims that are only tangentially connected to the United States.[56] In these cases, there is an absence of "the traditional bases for exercising [the United States'] sovereign jurisdiction to prescribe laws, namely nationality, territory, and effects within the United States."[57] If the United States lacks these connections, then it is probable that another nation is a better suited forum for the case. Deferring to another forum avoids any potential comity concerns,[58] and allows U.S. courts to avoid unnecessary labor when there are minimal U.S. interests involved. Exhaustion serves a U.S. interest of judicial efficiency.

Despite the advantage of judicial efficiency, some may question what the ultimate harm of parallel proceedings may be. One problem is that

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54. Simon v. Hungary, 37 F. Supp. 3d 381, 399–401 (D.D.C. 2014).

55. Freund v. France, 592 F. Supp. 2d 540, 579 (S.D.N.Y. 2008), *aff'd sub nom.* Freund v. Société Nationale des Chemins de fer Francais, 391 F. App'x 939 (2d Cir. 2010).

56. Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008) ("Where the 'nexus' to the United States is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.'").

57. *Id.* at 831.

58. *Id.* ("The lack of a significant United States 'nexus' to the allegations here stimulates the comity impulse.").

controversies may be settled in a piecemeal fashion, resulting in worse outcomes for all parties because tribunals may lack a complete picture or might assign damages from the same set of assets.[59] One or both parties seeking an anti-suit injunction against the other may also complicate proceedings.[60] Parallel proceedings also allow parties to forum shop. Because expanding notions of jurisdiction may allow multiple nations to adjudicate the same dispute, there is a "strong incentive to litigate in one country rather than another."[61] This results in attempts to litigate the same claims in the forums that each party finds most favorable.[62] U.S. jurisprudence has a strong preference against forum shopping, evidenced in part through the adoption of the *Erie* rule of civil procedure.[63] Exhaustion reduces the ability of parties to simply forum shop for the most favorable laws because it weeds out cases that lack a significant connection to the United States.

An additional benefit of exhaustion is predictability. Presently, district courts across the country have adopted varied approaches to cases with international interests, as discussed earlier. A predictable standard allows parties to act efficiently when choosing where to bring a claim and what to argue before that forum. If courts were to adopt a test of exhaustion, they could manage the varied interests involved in these types of cases within a workable framework. This framework would not only benefit judges, but would also allow parties to shape their arguments to account for the factors within the framework.

IV. Do Express Exhaustion Requirements Preclude Implied Exhaustion?

An argument against implied forms of exhaustion is that courts must enforce statutes when they have jurisdiction. In a case involving the act of state doctrine, the Supreme Court stated, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases

59. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818–19 (1976).

60. Born, *supra* note 8, at 567.

61. *Id.* at 547.

62. *Id.*

63. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965) ("The decision was also in part a reaction to the practice of 'forum-shopping' which had grown up in response to the rule of *Swift v. Tyson.* 304 U.S., at 73–74[.] . . . The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

and controversies properly presented to them."[64] Courts and commentators have relied upon express, textual requirements of exhaustion to illustrate when exhaustion can be properly invoked.

One example of an express, textual requirement for exhaustion can be found in the Torture Victim Protection Act ("TVPA").[65] At least one circuit has held that the exhaustion requirement is an unavoidable requirement. The Seventh Circuit held that even artful pleading, that is, using the ATS to claim a violation of international law, cannot sidestep the scope of the TVPA. The Seventh Circuit considered a case in which Nigerian plaintiffs claimed the Nigerian government committed torture and killings in violation of the law of nations.[66] At the district court level, the Nigerian government argued that the case should be dismissed because the plaintiffs had not exhausted local remedies, as the TVPA requires.[67] The district judge rejected the argument because the plaintiffs had not pled their case using the TVPA, but had used the ATS.[68] However, the appellate court rejected this approach, finding that the TVPA occupied the entire field for claims of torture or extrajudicial killings.[69] According to the Seventh Circuit, litigants bringing allegations of government torture are required to exhaust local remedies before bringing the claims to U.S. courts.

The Ninth Circuit has used the explicit exhaustion requirement of the TVPA to foreclose reading a similar requirement into the FSIA when reviewing a case from the Central District of California.[70] In *Cassirer v. Spain*, the district court considered Spain's argument that the FSIA required exhaustion of local remedies in a case involving the

64. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 409 (1990); *see also* Simon v. Hungary, 911 F.3d 1172, 1181 (D.C. Cir. 2018) ("Under the FSIA, courts are duty-bound to enforce the standards outlined in the statute's text . . . ").

65. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73(2)(b) ("Exhaustion of Remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.") (codified as amended at 28 U.S.C. § 1350).

66. Enahoro v. Abubakar, 408 F.3d 877, 878–79, 884 (7th Cir. 2005).

67. *Id.*

68. *Id.*

69. *Id.* at 884–85 ("If it did not, it would be meaningless. No one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law. While there is no explicit statement to this effect in *Sosa*, the implications are that the cause of action Congress provided in the Torture Victim Protection Act is the one which plaintiffs alleging torture or extrajudicial killing must plead.").

70. *See* Foreign Sovereign Immunities Act of 1976 §§ 1602–11, 28 U.S.C. §§ 1330, 1391(f), 1441(d).

expropriation of art during World War II.[71] That court used the inclusion of the exhaustion requirement in the TVPA as evidence that Congress did not intend the same requirement be read into the FSIA. It held "that the absence of a similar exhaustion requirement in the expropriation exception reflects the intent of Congress not to include an exhaustion requirement in Section 1605(a)(3)."[72] The timeline of when these two laws were written give reason to pause, however. The TVPA was passed in 1991, while the FSIA was passed fifteen years earlier. How can the fact that a later Congress decided to include a textual requirement of exhaustion mean that an earlier Congress purposively rejected this approach? Instead of using *expressio unius* to foreclose the possibility that another Congress may not have perceived the need for an explicit exhaustion requirement, courts should perhaps be willing to look beyond explicit exhaustion. Previous congresses may not have *affirmatively* chosen to leave out an explicit requirement of exhaustion, they may simply have not perceived the need for it.

When the Court of Appeals for the Ninth Circuit reviewed the Central District of California's decision en banc, it recognized the problematic nature of this inquiry.[73] It rejected the appellate court's use of *expressio unius* analysis, but still reached the same outcome. Rather than comparing the FSIA to other statutes, the Court focused on the text alone explaining ". . . we rely on the plain language of § 1605(a)(3) which contains no exhaustion requirement. This was the district court's primary conclusion, and it is one with which we agree."[74] The Court, however, did not reach the question of whether

71. Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1161 (C.D. Cal. 2006) ("In the present lawsuit, Plaintiff, the grandson of Lilly Cassirer Neubauer, seeks to recover from the Kingdom of Spain ('Spain') and the Thyssen-Bornemisza Collection Foundation (the 'Foundation'), a painting by Camille Pissaro (the 'Painting') that the Nazis extorted from his grandmother in 1939 as a condition to issuing her an exit visa.").

72. *Id.* at 1164; Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 663 (9th Cir. 1988) ("Where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.") (quoting Pena Cabanillas v. United States, 394 F.2d 785, 789 (9th Cir. 1968). Although not explicitly invoking the textual canon of *expressio unius est exclusio alterius*, this analysis embodies the principle that "when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded." JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 208 (2d ed. 2013).

73. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1034 (9th Cir. 2010) ("We recognize that extrapolating congressional intent for an earlier-enacted statute from a later-enacted statute is problematic.").

74. *Id.*

prudential exhaustion could be invoked and explicitly said so.[75] The majority opinion of the original panel in the Ninth Circuit that first reviewed *Cassirer* differed in this regard.[76] It agreed that there was no statutory requirement for exhaustion, but it preserved the option to argue that other forms of exhaustion may be available.[77] The majority panel of the Ninth Circuit explained,

> Finally, the court may, in its sound discretion, impose or waive exhaustion after assessing the availability, effectiveness, and possible futility of any unexhausted remedies in light of various prudential factors, including but not limited to: (1) the need to safeguard and respect the principles of international comity and sovereignty, (2) the existence or lack of a significant United States "nexus," (3) the nature of the allegations and the gravity of the potential violations of international law, and (4) whether the allegations implicate matters of "universal concern" for which a state has jurisdiction to adjudicate the claims without regard to territoriality or the nationality of the parties.[78]

The Ninth Circuit en banc refused to require the question of "prudential exhaustion."[79] However, the earlier panel's decision indicates that at least some judges are sympathetic to non-textual forms of exhaustion.

The question of whether courts can prudentially require exhaustion of foreign remedies, like the Ninth Circuit suggested in *Cassirer*, is unsettled amongst circuit courts. The D.C. Circuit has refused to read a requirement of exhaustion into the FSIA.[80] The Seventh Circuit, in

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75. *Id.* at 1037 ("We decline to consider at this stage of proceedings whether prudential exhaustion may be invoked to affect when a decision on the merits may be made.").

76. Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1062 (9th Cir. 2009), *vacated*, 590 F.3d 981 (9th Cir. 2009) (en banc).

77. *Id.* at 1063.

78. *Id.* at 1063–64.

79. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1037 (9th Cir. 2010) ("Necessarily, to do so we had to decide whether exhaustion is a statutory prerequisite to jurisdiction. We have determined that it is not: the expropriation exception does not *mandate* exhaustion. The district court went no further, nor do we.").

80. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 455 n.9 (AM. L. INST., Tentative Draft No. 2, 2016); Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 948 (D.C. Cir. 2008) ("The district court held that Agudas Chasidei Chabad was not required to exhaust Russian remedies before litigating in the United States. We believe this is likely correct, but that in any event the remedy Russia identifies is plainly inadequate.") (internal citations omitted).

comparison, has embraced a requirement of exhaustion. In *Abelesz v. Magyar Nemzeti Bank*, the court "agree[d] with the Ninth and D.C. Circuits that the FSIA does not contain a statutory exhaustion requirement."[81] However, the court believed that an allegation of expropriation did require exhaustion under *international law*.[82] A few years later when facing a similar case, the Seventh Circuit said that "principles of international comity" required exhaustion of foreign remedies.[83] The Restatement (Fourth) of Foreign Relations Law rejects the Seventh Circuit's inclusion of exhaustion because it "add[s] a substantive requirement for jurisdiction that is not supported by the statute or its legislative history."[84]

The Supreme Court, however, has not rejected non-textual exhaustion. In cases involving the ATS, the Court has left open the possibility of requiring exhaustion of foreign remedies, even when the statute does not call for it. In *Sosa v. Alvarez-Machain*, the Court heard a case in which the Drug Enforcement Administration ("DEA") approved the abduction of Alvarez-Machain, a Mexican national.[85] Sosa and other Mexican nationals kidnapped Alvarez-Machain from Mexico to stand trial in the United States for the murder and torture of a U.S. DEA agent.[86] The Court considered an argument of the European Commission as amicus curiae that international law requires a claimant to exhaust domestic remedies before attempting to bring claims in international forums.[87] Justice David Souter, writing for the majority, explained that in an appropriate case the Court would consider the argument that the European Commission raised: "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals."[88] The majority opinion also considered deferring to the political branches on a case by case basis.[89] Justice Souter

81. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 678 (7th Cir. 2012).

82. *Id.* at 679.

83. Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847, 852 (7th Cir. 2015).

84. The Restatement (Third) of Foreign Relations Law did not address exhaustion of domestic remedies in the context of the Foreign Sovereign Immunities Act. However, the Third Restatement did mention exhaustion in the context of the available remedies for injury to nationals of other states in the context of international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713 cmt. f (AM. L. INST. 1987).

85. Sosa v. Alvarez-Machain, 542 U.S. 692, 697–98 (2004).

86. *Id.*

87. *Id.* at 733 n.21.

88. *Id.* Although parts of this opinion were unanimous, this part of this opinion was joined by Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer.

89. *Id.*

invoked the existence of several class actions arising out of apartheid in South Africa to support this consideration.[90] The South African government opposed such cases because they interfered with the Truth and Reconciliation Commission's efforts, a position which the U.S. government supported.[91] Relatedly, Justice Breyer mentioned comity in his concurrence in *Sosa*. The fact that other nations could act in the same way that U.S. courts could gave Justice Breyer reason to pause.[92] He recognized that if the ATS became overly expansive it could actually undermine the international harmony that the ATS sought to protect.[93] Almost ten years later, in *Kiobel v. Royal Dutch Petroleum Co.*, Justice Breyer was able to develop this analysis further when writing the opinion of the Court.

In *Kiobel*, the Supreme Court considered what causes of actions courts could recognize under the ATS when the alleged violation occurred outside of the United States.[94] The Court limited the statute to "provid[e] jurisdiction only where distinct American interests are at issue."[95] Citing a desire to minimize international friction, Justice Breyer then listed several ways to further limit the use of the ATS when U.S. connections are minimal: exhaustion, *forum non conveniens*, comity, and the views of the Executive Branch.[96] Thus, the majority opinion in *Sosa* and Justice Breyer's concurrence in *Kiobel* illustrate an openness to a requirement of exhaustion, even without an explicit textual mandate.

The Court's analysis in *Sosa* and Justice Breyer's concurrence in *Kiobel* seemingly contradict the majority opinion of *W.S. Kirkpatrick &*

90. *Id.*

91. *Id.*

92. *Id.* at 761 (Breyer, J., concurring) ("Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help ensure that 'the potentially conflicting laws of different nations' will 'work together in harmony,' a matter of increasing importance in an ever more interdependent world. Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.") (internal citations omitted).

93. *Id.*

94. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 112–13 (2013). Petitioners were Nigerian nations living in the United States who were suing Dutch, British, and Nigerian corporations for aiding and abetting the Nigerian government's violations of the laws of nations. *Id.* at 111–12.

95. *Id.* at 133.

96. *Id.*

Co., penned by Justice Antonin Scalia.[97] *W.S. Kirkpatrick & Co.* is one of a number of cases which seems to adopt *Colo. River Water's* sensibility that the obligation of federal courts is "virtually unflagging" when they have jurisdiction.[98] However, even in the oft-cited case of *Colo. River Water Conservation District*, the Court envisioned situations in which federal courts would not exercise their power: "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required . . . . Only the clearest of justifications will warrant dismissal."[99] The advantages of exhaustion in cases where foreign sovereigns are defendants provide these clear cases.

V. Areas of Concern

The use of non-textual exhaustion may have certain disadvantages, especially for plaintiffs. An exhaustion requirement might result in vastly different remedies, or no remedy at all. Moreover, even if a plaintiff returns to a U.S. forum after exhausting local remedies, the requirement has generated great delay and cost. Despite these concerns, on balance the advantages of the exhaustion requirement outweigh its harms. Additionally, many of the concerns about such a requirement can be avoided if plaintiffs plead the futility of remedies initially.

A test of prudential exhaustion places a burden on the plaintiffs to first attempt remedies in a nation other than the United States. However, plaintiffs can rebut this requirement by showing that exhausting those remedies would be futile.[100] Plaintiffs can satisfy this requirement "by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."[101] Similar to a *forum non conveniens* analysis, the existence of a remedy in another forum depends on whether jurisdiction

97. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 409 (1990).

98. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); W.S. Kirkpatrick & Co., 493 U.S. at 409.

99. *Id.* at 818–19 (internal citations omitted).

100. Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1063 (9th Cir. 2009), *vacated*, 590 F.3d 981 (9th Cir. 2009) (en banc); *see* Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 89 (D.D.C. 2014) ("An essential element of this exhaustion requirement is that there be effective, nonfutile remedies available in the alternative, local forum. [Sarei v. Rio Tinto, PLC, 550 F.3d 822, 830 (9th Cir. 2008)]. It is the defendant's burden to 'plead and justify an exhaustion requirement, including the availability of local remedies.'").

101. *Cassirer*, 580 F.3d at 1063.

could be exercised over the defendant.[102] The ability of the plaintiff to argue futility exists in both the domestic practice of exhaustion and in international law. For example, in *habeus corpus* exhaustion, "state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability."[103] In international law, either unavailability or futility fulfills the exhaustion requirement.[104]

To demonstrate how a court would evaluate a plaintiff's argument for futility, consider *Doe v. Exxon Mobile Corp.*[105] In that case, the United States District Court for the District of Columbia considered whether Indonesian plaintiffs had exhausted local remedies. The plaintiffs alleged that Indonesian soldiers committed wrongful death and other wrongs while working on behalf of Exxon and its subsidiaries to guard a natural gas field.[106] The court accepted the plaintiffs' argument that Indonesian human rights tribunals could not provide recovery in this case because of political corruption.[107] The plaintiffs used a U.S. State Department report on the Indonesian court system to support their claim.[108] The court explained that, "[t]hese problems are sufficient to demonstrate that pursuit of local remedies in Indonesia would be futile."[109] Demonstrating futility is a valid exception to a general requirement of exhaustion because the balance of factors shifts. Without a valid remedy, plaintiffs have no opportunity for justice, which is unacceptable if a court has jurisdiction.

If a plaintiff can successfully argue the futility of the remedy in another forum, then the plaintiff can avoid the delay and cost of actually trying to exhaust the remedy in another country. Even if a plaintiff cannot allege futility, it is not certain that the plaintiff will ever return to the United States to again argue that the remedies were futile. The plaintiff may actually receive some recovery if they attempt to recover abroad. In fact, if a foreign sovereign defendant is involved, there is an incentive to satisfy the plaintiff at the local level so that the sovereign does not have to litigate the case in the United States.

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102. *Doe*, 69 F. Supp. 3d at 90–91 ("This means, as in a forum non conveniens inquiry, that the court must also consider whether the defendant would be amenable to service of process in the foreign jurisdiction.").

103. Woodford v. Ngo, 548 U.S. 81, 92 (2006).

104. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 cmt. d (AM. L. INST. 1987).

105. 69 F. Supp. 3d 75 (D.D.C. 2014).

106. *Id.* at 83.

107. *Id.* at 90.

108. *Id.*

109. *Id.*

There is still a concern that, although a plaintiff might recover in another country, the remedy might substantially differ. This is a problem that may be unavoidable. However, similar to a *forum non conveniens* analysis, the favorability of the law should not play a factor.[110] Not only is this consistent with the federal practice of *forum non conveniens*, but the preferences of the plaintiff, which might be given deference as "the master of the complaint," should not be unchallenged. Usually in a *forum non conveniens* analysis a plaintiff's choice of forum is given deference.[111] However, if a plaintiff chooses a forum that is not her home forum, she loses that deference because it is no longer presumed to be convenient.[112] Similarly, in an exhaustion analysis the plaintiff's choice of forum should not be given substantial weight, especially considering the extenuated connection these plaintiffs may have with the United States. Plaintiffs may be directed to a forum with different remedies, but this should not alter the consideration.

In short, the problems associated with delay can be mitigated if plaintiffs plead futility initially. Of course, sometimes courts will mistakenly find that remedies exist even when they do not. Those plaintiffs will

110. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (These differences are not a consideration unless the remedy "is so clearly inadequate or unsatisfactory that it is no remedy at all."). *Forum non conveniens* is similar to exhaustion in that it involves one court declining to exercise jurisdiction in favor of another forum. However, the factors that motivate the use of *forum non conveniens* are different from those underlying exhaustion. The trial court's decision to use *forum non conveniens* should be based on a balancing of public and private interest factors. Private interests include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). "The public factors bearing on the question included the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft Co.*, 454 U.S. at 241 n.6 (quoting *Gulf Oil*, 330 U.S. at 509).

111. *Piper Aircraft Co.*, 454 U.S. at 255–56.

112. *Id.*; *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 304 cmt. d (AM. L. INST., Tentative Draft No. 2, 2016) ("Federal courts apply a presumption in favor of the plaintiff's choice of forum. The presumption is strongest when the real party in interest is a U.S. resident bringing suit in a U.S. court. The choice of a U.S. court by a foreign real party in interest, including a nonresident U.S. citizen, is entitled to less deference.").

experience delay. However, this inconvenience can also be mitigated if courts stay proceedings rather than dismissing them. Courts will inevitably exclude some worthy cases, but the value of prudential exhaustion as a whole outweighs the problem of delay.

A separate concern arises in a situation where a plaintiff has exhausted her remedies in another country and returns to the United States to claim that those remedies were futile.[113] In that situation, U.S. courts may have to judge the merits of a case from another nation's judicial system. This could create friction between the United States and that nation. However, at least in this situation, U.S. courts have first deferred to the other nation and allowed it an opportunity to respond. If the response is insufficient, the plaintiff's interest in obtaining relief should weigh more heavily than a concern about offense. Despite admission that these circumstances may inevitably arise, the use of prudential exhaustion will actually reduce the number of situations in which the judiciary is placed in this challenging position. Because prudential exhaustion will narrow the field of cases that would normally be heard, the number of cases that involve foreign countries and could cause foreign relations frictions will be reduced. The funneling nature of prudential exhaustion thus still, on average, reduces foreign relations frictions in addition to other advantages.

VI. Test Case

The case of *Simon v. Hungary* demonstrates how prudential exhaustion should operate.[114] In *Simon*, Hungarian victims of the Holocaust sued Hungary and the state-owned railroad, Magyar Államvasutak Zrt., for various property claims. Most of the plaintiffs had survived not only the ghettoization of Hungary, but were also sent via train to concentration camps. Their belongings and those of their families were taken as

113. Another concern may be whether U.S. courts can reconsider these international cases because of *res judicata* or collateral estoppel. Born, *supra* note 8, at 1078–85 ("There is presently no federal standard governing the enforcement by U.S. courts of judgements rendered by foreign courts."). Practice varies, state by state, on the recognition of foreign judgments. Some states use their own common law, others have adopted Uniform Foreign Money Judgements Recognition Act. *Id.* at 1080. According to the Restatement (Second) of Conflict of Laws, "A valid judgement rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United State so far as the immediate parties and the underlying cause of action are concerned." Restatement (Second) of Conflict of Laws § 98 (Am. L. Inst. 1971). However, this recognition is conditioned on the foreign court having jurisdiction and the fairness of the trial. The court cannot refuse on error of law or fact, but can refuse if the above conditions are not satisfied. *Id.* § 98 cmt. c.

114. Simon v. Hungary, 37 F. Supp. 3d 381 (D.D.C. 2014).

they were forced from their homes into ghettos and upon arrival at concentration camps.[115] For the purposes of this case study, this Note will assume that the United States has jurisdiction over both the railroad and Hungary.

The District Court of the District of Columbia considered a second Motion to Dismiss for failure to exhaust remedies and *forum non conveniens*.[116] The district court dismissed the case because it did not believe that Hungary was an inadequate forum, nor would Hungarian remedies be futile.[117] The United States Court of Appeals for the District of Columbia rejected the lower court's approach to exhaustion.[118] It held that "there is no room in those 'comprehensive' standards governing 'every civil action,' for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew."[119] The Court of Appeals relied on the text of the FSIA and the duty of courts to decide cases when they have jurisdiction.[120] This approach, as this Note has argued, is the wrong one.

In July of 2020 the Supreme Court granted Hungary's cert petition to answer the following question: "May the district court abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reason of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost during World War II, and where the plaintiffs made no attempt to exhaust local Hungarian remedies?"[121] The Supreme Court should embrace non-textual exhaustion as a holistic analysis of comity, U.S. connections to the case, the perspectives of the political branches, and

115. *Id.* at 385–90. It should be noted that when the case was filed, four of the plaintiffs were domiciled in the United States. However, at the time of the alleged wrongs plaintiffs were Hungarian citizens. This could provide grounds for a meaningful argument about the right of U.S. citizens to bring suit in forums within their home country. For the present analysis, these arguments will be placed to the side.

116. Simon v. Hungary, 277 F. Supp. 3d 42, 52 (D.D.C. 2017), *rev'd and remanded*, 911 F.3d 1172 (D.C. Cir. 2018).

117. *Id.* at 53 ("Thus, the prudential exhaustion and *forum non conveniens* doctrines both provide a compelling basis for 'declin[ing] to exercise jurisdiction,' [Simon v. Hungary, 812 F.3d 127, 149 (D.C. Cir. 2016)], and dismissing the plaintiffs' claims.").

118. Simon v. Hungary, 911 F.3d 1172, 1180 (D.C. Cir. 2018).

119. *Id.* at 1181 ("In short, controlling circuit and Supreme Court precedent give no quarter to Hungary's theory of judicial immunity wrapped in exhaustion clothing.") (internal citations omitted).

120. *Id.* ("Under the FSIA, courts are duty-bound to enforce the standards outlined in the statute's text, and when jurisdiction exists (as it does at least over MÁV) . . .").

121. Hungary v. Rosalie Simon, et al., 911 F.3d 1172 (D.C. Cir. 2018), *cert granted*, 2020 U.S. LEXIS 3533 (July 2, 2020) (No. 18-1447).

the futility of foreign remedies. In this case, the *Simon* plaintiffs should be required to first exhaust remedies in Hungary.

Comity supports allowing a foreign sovereign defendant to address the wrongs it has committed in its own courts. In *Fischer v. Magyar Allamvasutak Zrt*, the Seventh Circuit considered facts nearly identical to the ones in the *Simon* case.[122] That court ruled that "international law favors giving a state accused of taking property in violation of international law an opportunity to 'redress it by its own means, within the framework of its own legal system' before the same alleged taking may be aired in foreign courts."[123] This principle can be extended past cases of expropriation or takings to any case in which a foreign sovereign is a defendant. This action would give Hungarian courts at issue in *Simon* the respect that U.S. courts would expect.

More than simply showing respect to other nations, which is a laudable step towards harmony, requiring prudential exhaustion in *Simon* allows the United States to avoid potential conflict with Hungary. Whenever foreign sovereigns are defendants, there is a possibility of friction. Even before a U.S. court rules on the merits of the case, the act of exercising jurisdiction of another sovereign is a potentially dangerous decision. The experience of U.S. courts in the era before the FSIA illustrates this dilemma. Before the FSIA codified the way in which courts offer immunity, the State Department was placed in an awkward position of having to decide whether to intervene to ask for immunity on behalf of foreign sovereigns.[124] Some may argue that the exhaustion requirement places courts in that same uncomfortable position. However, a consideration of comity generally favors abstention, thus avoiding judgment of other sovereigns.

Weighing the extent of U.S. interests in the *Simon* case also points toward requiring exhaustion. This claim seeks to remedy, in a very small way, the horrors of the Holocaust. Although the global community has an interest in preventing genocide and compensating its victims, this case does not illustrate why the United States has a particularly unique interest. Although four of the plaintiffs are now domiciled in the United States, the other plaintiffs are citizens of Australia, Canada, and Israel. The fact that the Hungarian railroad operated in the United States is not sufficient to show why the United States is a better suited

122. 777 F.3d 847, 852–53 (2015).

123. *Id.* at 855 (quoting Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 680 (7th Cir. 2012) (another case in which Hungarian survivors of the Holocaust sued the Hungarian railroads and banks)).

124. Austria v. Altmann, 541 U.S. 667, 689–91 (2004).

forum than Australia, Canada, Israel, or Hungary for that matter. The United States has a general interest in the restoration of justice after the Holocaust; however, that does not mean that U.S. courts have a special obligation to hear cases like *Simon* that bear little connection to the United States.

In the case of Holocaust claims, the perspective of the Executive Branch is likely in favor of exhaustion.[125] Although there was no statement of interest or amicus filing in the *Simon* litigation, a statement of interest in a similar proceeding explains the policy of the government with respect to Holocaust related claims. In *Scalin v. Société Nationale des Chemins de Fer Français*, the Illinois Northern District Court considered a claim against the French national railroad for property takings. The plaintiffs alleged that the French railroad transported their family members to Nazi concentration camps, taking their property and either keeping it or giving it to the Nazis.[126]

The United States submitted a statement of interest in the case supporting dismissal on several grounds: *forum non conveniens*, comity, failure to exhaust domestic remedies, and a lack of subject matter jurisdiction.[127] The proposed exhaustion test would combine several of these arguments into one framework. However, the U.S. perspective illustrates why exhaustion should be required in this case. The government explained that seventy years have passed since the Holocaust and many of its survivors are dying.[128] Because of the urgent need to address these claims, "[t]he United States therefore believes that concerned parties, foreign governments, and non-governmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation."[129] This approach is favored instead of litigation that would "subject victims and their families to the prolonged uncertainty and delay."[130] This statement, which could have easily been filed in *Simon*, illustrates that not requiring exhaustion in this case would be against the policy of the Executive Branch. Moreover, it also addresses a concern that requiring exhaustion produces undue delay for aging plaintiffs. In response to

125. This assumption is based on previous statements of interest filed during the Obama administration. The Trump administration may take a different approach.

126. Scalin v. Société Nationale des Chemins de Fer Français, No. 15-cv-03362, 2018 U.S. Dist. LEXIS 48805, at *2 (N.D. Ill. Mar. 26, 2018).

127. *Id.* at *21.

128. Statement of Interest of the United States of America, at 2, Scalin v. Société Nationale des Chemins, No. 15-cv-03362 (N.D. Ill. Mar. 26, 2018).

129. *Id.*

130. *Id.*

these factual conditions, the Executive Branch supports alternatives, redirecting plaintiffs from litigation to other policy solutions.[131]

Despite the fact that all considerations point to requiring exhaustion, if plaintiffs can prove that it would be futile to require the exhaustion of foreign remedies, that would be sufficient to alter the balance. Using the analysis in *Fischer* as a proxy for what would happen in *Simon*, the plaintiffs in *Simon* would not be able to satisfy this burden. The court in *Fischer* evaluated whether Hungary could serve as an adequate forum for Holocaust claims. The court relied on statements that Hungary extended the statute of limitations for Holocaust-related claims.[132] Additionally, the Hungarian national counsel said that the national defendants would not assert statute of limitations defenses.[133] That court also considered the fact that Hungary does not allow for class actions. It found that most nations do not have United States-style class actions, and the absence of class actions did not mean there was not an effective remedy.[134] The Seventh Circuit also considered whether judicial restructuring and prevalent anti-Semitism in Hungary would prevent an adequate outcome.[135] The court was not convinced that Hungary could not serve as an adequate alternative.[136]

If faced with facts similar to those in *Simon*, as the foregoing paragraphs illustrate, a court should dismiss the case because all factors weigh in favor of comity, assuming that the plaintiffs cannot prove futility of Hungarian remedies.

VII. Conclusion

This Note began with a brief discussion of Supreme Court cases heard in the 2018 Term that raised questions about the role of the U.S. judiciary in international affairs. In December of 2020 the Court heard another case, *Simon*, which raises questions about the role of the judiciary in issues beyond the United States. Although the deferential positions the Court has adopted in these previous cases and the doctrine of exhaustion serve similar goals, exhaustion would have likely produced

131. *Id.*

132. Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847, 862 (2015).

133. *Id.*

134. *Id.* at 861.

135. *Id.* at 863.

136. *Id.* at 867–68. *See also* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 684 (7th Cir. 2012) ("Plaintiffs have presented nothing to indicate that the Hungarian courts would be so obviously incapable of providing a fair and impartial hearing that U.S. courts should take the extraordinary step of hearing these claims without even giving Hungarian courts an opportunity to address them.").

different outcomes. If a lower court had used a doctrine of prudential exhaustion, it is probable that these cases would have been resolved far sooner. If a court uses comity-inspired deference, the case ends. In comparison, exhaustion embodies deference, but allows the case to proceed in a forum with a closer connection to the case. A U.S. court would never have had to rule on many of these cases because the plaintiffs would have been sent to a different forum. Only if there was no other forum or if the connections to the United States were more substantial would the outcome be different. But if courts are going to continue splitting hairs over the ATS, the FSIA, or similar statutes, it seems that judicial resources should be spent on cases that are more closely connected to the United States.

A doctrine of exhaustion is a judicially manageable standard that would redirect cases to more appropriate forums when the connections to the United States are minimal. Although some statutes, such as the TVPA, expressly require exhaustion, this should not be read as barring exhaustion when claims are made under different statutes.[137] Exhaustion also has a long history in both U.S. and international law. In the domestic context, exhaustion promotes judicial efficiency and the "comity of the courts."[138] Internationally, exhaustion respects state sovereignty and reduces international friction.[139] Using prudential exhaustion in cases involving foreign sovereigns harnesses the advantages of both approaches.[140] Although some may be concerned about the potential burdens this places on plaintiffs, allowing plaintiffs to plead the futility of foreign remedies provides them with a counterbalance against the exhaustion requirement.[141] Additionally, this proposed exhaustion requirement suggests that courts stay proceedings, rather than dismiss them, to correct for those instances in which foreign remedies do not exist or are insufficient.[142] In *Simon*, the Supreme Court now has the opportunity to standardize the judiciary's approach in a complex area of law involving significant, collateral consequences through non-textual exhaustion.

137. *See supra* Section III.
138. *See supra* Section II.A.
139. *See supra* Section II.
140. *See supra* Section II.
141. *See supra* Section IV.
142. *See supra* Section IV.