

ADJUDICATORY COMITY—A DISTINCT ROLE FOR INTERNATIONAL ABSTENTION IN TRANSNATIONAL CASES

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ABSTRACT

This essay in honor of Professor David Stewart addresses an important question that has arisen under the Foreign Sovereign Immunities Act as well as in private litigation—the availability of a distinct doctrine of international comity abstention as a basis for dismissal of a case in favor of a foreign forum. I argue that various doctrines of adjudicatory comity—parallel proceedings, forum non conveniens, and international abstention—serve separate purposes and that it would be wrong to conflate them or to view them as redundant with each other. I also highlight Professor Stewart’s work on the sovereign immunity sections of the Restatement (Fourth) of Foreign Relations Law and in a Seventh Circuit Amicus Brief, where he distinguishes obligations under international law from discretionary doctrines of comity under U.S. law. I hope David will also agree with me that international comity abstention in both FSIA expropriation cases as well as in certain private cases is appropriate.

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I. INTRODUCTION

My choice of topic for David’s festschrift ties to my first meeting with him almost 25 years ago when he was the Assistant Legal Adviser for Diplomatic Law and Litigation at the State Department, with responsibility for overseeing such issues as assertions of sovereign immunity by foreign defendants in courts of the United States, and I was acting as counsel in one of the early cases that raised the issue of the retroactivity

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of the Foreign Sovereign Immunities Act.¹ A more recent sovereign immunity case² (related to the earlier one and one in which I also had a role) raised a different issue in which David's work as the Reporter for the Fourth Restatement of Foreign Relations Law was significant—that is, whether there is a doctrine of international comity abstention that can be invoked to dismiss a case in favor of a foreign forum, whether against a private party or a foreign state.

This issue continues to be controversial. Professors Bill Dodge and Maggie Gardner have argued that no such independent doctrine should exist and that it is largely redundant with standard *forum non conveniens* analysis, except that plaintiffs cannot benefit from the deference courts afford to plaintiff's choice of forum in a *forum non conveniens* motion. I maintain that *forum non conveniens* and international comity abstention are doctrinally distinct inquiries that serve different purposes. In short, *forum non conveniens* is about litigation interests: the convenience of the litigants and the burdens on the U.S. forum. By contrast, international comity abstention considers both domestic foreign policy interests as well as important regulatory interests of the foreign forum.

Even when acknowledged as a doctrine separate from *forum non conveniens*, the terms “international comity” and “international abstention” are often used interchangeably with each other, even when used to describe different situations. Initially, international abstention was invoked to stay or dismiss proceedings on the basis of foreign parallel proceedings, but later it was relied upon, *even in the absence of parallel proceedings*, to consider the respective interests of the United States and the foreign country in hearing a particular case.

In some instances, a court's invocation of international comity or international abstention has included an “exhaustion of remedies” principle, and such an “exhaustion requirement” has created a confusion of its own.³ That is because there is a customary international law obligation with respect to exhaustion that applies only in international

1. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611. *See* *Abrams v. Société Nationale des Chemins de fer Francais*, 332 F.3d 173 (2d Cir. 2003), vacated and remanded, 124 S.Ct. 2834 (2004); on remand, 389 F.3d 61, 63 (2d Cir. 2004) (considering case in light of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)).

2. *Scalin v. Société Nationale des Chemins de fer Francais*, 8 F.4th 509 (7th Cir. 2021). *See* discussion *infra* p. 16.

3. Many of these actions are brought under the Foreign Sovereign Immunities Act where the defendants are foreign sovereigns or instrumentalities and rely on “prudential exhaustion” to dismiss a case in the service of international comity. *See e.g.*, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015) (“[P]rinciples of international comity make clear that these

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tribunals and not to cases in domestic courts. At the same time, concerns about international comity in a particular case may justify a rule of exhaustion of adequate and available remedies as a prudential matter and lead a court in the United States to dismiss or stay proceedings. We can thank David, as the Reporter for the Restatement (Fourth) of Foreign Relations Law in charge of the sections on sovereign immunity, for calling attention to the two different contexts involving “exhaustion.”⁴ However, the chapter on immunity in the Restatement (Fourth) does not go further to address the role of “international comity abstention” in an FSIA expropriation case. A different section of the Restatement on *forum non conveniens* (authored by a different Restatement Reporter) includes a comment stating that *forum non conveniens* is the only doctrine approved by the Supreme Court allowing dismissal in favor of foreign courts,⁵ and that although lower federal courts have invoked international abstention, its status remains uncertain.⁶ I believe that David acknowledges a role for both *forum non conveniens* and *international abstention* in an appropriate case, including expropriation claims brought under the FSIA. He expressed that view in an amicus brief he filed (together with Professor Paul Stephan)⁷ in the Seventh Circuit expropriation case, *Scalin v. Société Nationale SNCF SA*,⁸ in which I was involved. This article, written in his honor, attempts to show that this position is the correct one.

II. THE BACKDROP FOR INTERNATIONAL COMITY ABSTENTION

A. Foreign Parallel Proceedings

In the absence of a formal *lis pendens* doctrine used by many civil law countries to address foreign parallel proceedings, courts in the United States often rely on *forum non conveniens* to further objectives served by that civil law doctrine in other systems. Alternatively, and using other terminology when another action is pending abroad, courts in the

plaintiffs must attempt to exhaust domestic remedies before foreign courts can provide remedies for those violations.”).

4. RESTATEMENT (FOURTH) OF FOREIGN REL. LAW: CLAIMS CONCERNING PROP. TAKEN IN VIOLATION OF INT’L LAW § 455 rep.’s n. 11 (A.L.I. 2017); see also DAVID P. STEWART, FED. JUD. CTR., THE FOREIGN SOVEREIGN IMMUNITIES ACT: GUIDE FOR JUDGES 57-58 (2013).

5. RESTATEMENT (FOURTH) OF FOREIGN REL. LAW: FORUM NON CONVENIENS § 424 (A.L.I. 2017).

6. *Id.* cmt. i; see also *id.* rep.’s n. 9.

7. Brief of Amici Curiae Professor Paul B. Stephan and David P. Stewart in Support of Defendant-Appellee and Affirmance at 4, *Scalin v. Société Nationale des Chemins de fer Français*, 2018 WL 5919384 (7th Cir. 2018) (No. 18-1887) (noting that both *forum non conveniens* and international comity have been invoked to stay or dismiss claims against foreign states brought under the FSIA) (hereinafter “Scalin Amicus Brief”).

8. 8 F.4th 509 (7th Cir. 2021).

United States have stayed (or dismissed) U.S. actions using the more amorphous language of “international abstention.” That concept has a domestic backdrop when there are parallel state and federal proceedings. In that context, the Supreme Court in *Colorado River Water Conservation District v. United States* has held that federal courts have a “virtually unflagging obligation” to exercise jurisdiction conferred on them by Congress, but in exceptional cases, a federal court should stay a suit and await the outcome of parallel state proceedings as a matter of “wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.”⁹ Although several appellate courts faced with foreign parallel proceedings have referenced *Colorado River* as precedent for staying or not staying a case in favor of the foreign proceeding, I do not believe the analogy fits the transnational context. *Colorado River* appears rooted in concerns about federalism and full faith and credit, which are largely distinct from the unique concerns in transnational litigation that involve potential international friction between U.S. and foreign courts as the result of differences about both substance and remedy.

B. *International Comity Abstention in the Absence of Parallel Proceedings*

As noted above, many of the initial applications of “international abstention” were cases in which a court having established jurisdiction would nonetheless stay or dismiss a case on the basis of foreign parallel proceedings. Such abstention has been referred to as a *retrospective* application of comity. Subsequently, however, some courts, even in the absence of parallel proceedings, rested their decision to abstain on a broader notion of international comity. The application of international comity in this situation has been characterized as a *prospective* application of the doctrine. In both situations, however, courts tend to use the language of comity and abstention interchangeably. Sometimes a court refers to “international abstention;” other times the term used is “international comity” or “comity abstention” or even “international comity abstention” to refer to the same concept—often within the same case. One court, attempting to explain the difference between “international abstention” (retrospective application) and “international comity” (prospective application) observed that “international abstention” was based on concerns about the possibility of conflicting findings due to parallel litigation, whereas “international comity” embraced broader interests that a foreign nation might have in hearing a particular matter such that the U.S. court would stay or dismiss its action.¹⁰

9. 424 U.S. 800, 817-18 (1976).

10. See *Mujica v. AirScan, Inc.*, 771 F.3d 580, 611-12 (9th Cir. 2014) (explicitly considering Colombia’s “interest in litigating the matter” and ultimately dismissing the case).

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In any event, I will use the term “international comity abstention” to refer to the basis on which some courts stay or dismiss an action in deference to the *regulatory* interests of a foreign country in the absence of parallel proceedings abroad. These broader “international comity abstention” cases take into account an array of sovereign interests by states rather than only concerns about litigation burdens and convenience—which is the focus of both *forum non conveniens* and “parallel proceedings” abstention that looks to avoid duplicative litigation and conflicting findings.

A number of federal courts have invoked this broader concept of “international comity abstention” to stay or dismiss a case to permit the courts of another country with a stronger regulatory interest in adjudicating the claims to do so within its territory and pursuant to its legal system. For example, in *Ungaro-Benages v. Dresdner Bank AG*, the Court of Appeals for the Eleventh Circuit affirmed the district court’s decision to refrain from deciding claims against two private German banks arising from their alleged participation in Nazi-era seizures of property from German Jews.¹¹ In 2000, the German government, with the encouragement of the United States, established the Remembrance, Responsibility and Future Foundation as the exclusive forum for the resolution of litigation against German corporations related to their acts during the Nazi era. As part of that arrangement, the United States promised to file a statement of interest in any lawsuit dealing with World War II restitution or reparations claims, indicating that it was in the foreign policy interests of the United States for the case to be dismissed on any valid legal ground.¹² The United States did file such a statement, as included in its amicus brief.¹³

In affirming the dismissal of the action on international comity grounds, the Eleventh Circuit articulated a multi-factor standard for invoking international comity: federal courts can dismiss or stay a case on international comity grounds “based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum.”¹⁴ In conducting its analysis under this standard, the court identified the following relevant factors: “the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the alternative forum.”¹⁵ Evaluating these factors in the case before it,

11. 379 F.3d 1227 (11th Cir. 2004).

12. *Id.* at 1231.

13. *Id.* at 1231 n. 6.

14. *Id.* at 1238.

15. *Id.*

the court emphasized the importance of the U.S. interest in using the Foundation—as reflected in the statement of interest filed by the State Department—and the strength of the German government’s interest in ensuring that all claimants seek recovery against the Foundation.¹⁶ In evaluating the adequacy of the foreign forum, the court noted that its comity analysis was “informed” by *forum non conveniens*.¹⁷ Accordingly, it found that the Foundation was an adequate alternative forum based on its specialized knowledge of the relevant post-war law and the relaxed burden of proof on potential plaintiffs. The fact that awards from the Foundation could be less than awards from U.S. courts was not enough to make the Foundation an inadequate forum.¹⁸

At present, only the Ninth Circuit has joined the Eleventh Circuit in recognizing the approach to international comity laid out in *Ungaro-Benages*. In *Mujica v. AirScan*, survivors of a Colombian military raid against a Colombian village sued two U.S. corporations in the Central District of California for their involvement in the raid.¹⁹ The plaintiffs pleaded violations of international human rights law under federal law as well as several state-law claims. The court of appeals found that the district court had abused its discretion in refusing to dismiss the state law claims on the basis of international comity.²⁰ Noting that comity has values similar to those of *forum non conveniens* and is “concerned with maintaining amicable working relationships between nations” and “common courtesy and mutual respect between those who labour in adjoining judicial vineyards,” the Ninth Circuit pointed to the three-factor test in *Ungaro-Benages* as a “useful starting point” for analyzing assertions of comity.²¹ In addition, the Ninth Circuit identified a further list of sub-factors to inform its international comity analysis. For instance, in evaluating the United States’ and the foreign government’s interests, the court considered: (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of both countries, and (5) any public policy interests, including those of the state when state law claims

16. *Id.* at 1231 n.6, 1237-40.

17. *Id.* at 1238.

18. *Id.* at 1239-41.

19. 771 F.3d 580, 584-585 (9th Cir. 2014).

20. *Id.* at 588, 602-603. The district court had dismissed the case on the basis of the foreign affairs doctrine and the political question doctrine but had ruled that the international comity doctrine was inapplicable. *Id.* The Court of Appeals did not address these alternative bases for the court’s dismissal but instead found that dismissal was warranted on grounds of international comity. *Id.*

21. *Id.* at 598, 603.

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are involved.²² Of particular significance to the court of appeals was the United States' statement of interest filed in the district court and its amicus brief on appeal, offering various reasons why it was in the interest of the United States to have this case heard in Colombia.²³ The Ninth Circuit ultimately concluded that considerations of comity justified dismissal of the plaintiff's state law claims.²⁴ The Ninth Circuit affirmed its approach to international comity in *Cooper v. Tokyo Electric Power Co. Holdings, Inc.*²⁵ In *Cooper*, the Ninth Circuit considered whether the district court on remand had appropriately dismissed U.S. servicemen's claims against the Japanese owner of the Fukushima Daiichi Nuclear Power Plant on international comity grounds. In the district court, Japan filed an amicus brief strongly objecting to the case proceeding in a U.S. court.²⁶ The district court ultimately dismissed the case using the test for "international comity" promulgated in *Mujica*.²⁷ On appeal, the United States, at the invitation of the Ninth Circuit, filed its own amicus brief urging the court *not* to dismiss the case. The U.S. government's position was that it did not want Japan to retroactively receive exclusive jurisdiction over the suits under the Convention on Supplementary Compensation for Nuclear Damage (which Japan hadn't signed at the time of the Fukushima Daiichi incident) without having borne the costs *ex ante*.²⁸

Nonetheless, the Ninth Circuit ultimately affirmed the district court's exercise of international comity. Although the panel considered the U.S. government's interest in preventing non-signatories to the Convention from freeriding, it held that the U.S. interest at stake "pale[d] in comparison to Japan's unequivocal objection to the exercise of jurisdiction in U.S. courts."²⁹

Most recently, the Eighth Circuit Court of Appeals in *Reid v. Doe Run Resources Corp.* considered whether this type of adjudicatory comity

22. *Id.* at 604.

23. *Id.* at 609-10. The court noted the Supreme Court's opinion in *Republic of Austria v. Altmann*, which suggested that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* (quoting 541 U.S. 677, 702 (2004)). Accordingly, the court chose to "give serious weight to the Executive Branch's view of [this] case's impact on foreign policy." *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.21 (2004)).

24. *Id.* at 604.

25. 960 F.3d 549 (9th Cir. 2020).

26. *Id.* at 568.

27. *Id.* at 565-69.

28. *Id.* at 567 n.14, 568.

29. *Id.* at 569.

should be invoked to dismiss a case.³⁰ In *Reid*, 1,400 Peruvian citizens brought suit in Missouri state court (and then subsequently removed to federal court), alleging that as children they had suffered harm from exposure to toxic substances from a smelter in Peru and asserting claims under Missouri law. They named as defendants Doe Run, a U.S.-based company, and its Peruvian subsidiary who had purchased the smelter and refinery operations from a Peruvian state-owned company and taken over their operations. The defendants moved in the district court that the court abstain on the basis of international comity, relying on the Trade Promotion Agreement between the United States and Peru as well as broader foreign policy concerns. The district court denied the motion but certified the issue for interlocutory appeal. The Eighth Circuit affirmed the district court and, although urged to reject foreign-policy abstention outright,³¹ held only that even assuming that a doctrine of international comity exists, the doctrine should be reserved for those “rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereign aligned in supporting dismissal.”³² To that end, the Eighth Circuit noted that neither the State Department nor the government of Peru had submitted a declaration of its position in the case. Under the circumstances of the case, the court did not find the application of prospective international comity warranted.

Notwithstanding the criticism that international comity is uncabined and highly discretionary, international comity serves an important function in the exercise of adjudicatory authority in transnational litigation.³³ Moreover, the existing case law does offer the possibility of presumptive rules that can lead to principled results. Two factors have emerged as especially important in the international comity analysis: (1) whether the Executive branch has issued a statement of interest urging dismissal for foreign policy reasons; and (2) whether there exists an alternative

30. 110 F.4th 1049, 1052 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 1309 (2025) (mem).

31. See Brief of Professors William S. Dodge and Maggie Gardner in Support of Plaintiff Appellees and Affirmance at 4-5, 7-18, *Reid v. Doe Run Res. Corp.*, 110 F.4th 1049 (8th Cir. 2023) (No. 23-1625) (arguing that the Court should reject the invitation to adopt *Mujica*'s doctrine of foreign-policy abstention as the law of the Circuit because it is an isolated doctrine adopted in only two other Circuits and incompatible with other doctrines of comity).

32. *Reid*, 110 F.4th at 1055 (quoting *GDG Acquisitions LLC v. Government of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014)).

33. Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169, 171-72 (2020) (characterizing and then rejecting the view that international comity abstention is necessarily unworkable and then identifying four “central elements”).

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remedial scheme in another forum with a closer connection to the dispute whose efficacy would be undermined by litigation in U.S. courts.

Deference to the State Department's views about foreign relations is a common theme in cases involving stays or dismissals on grounds of international comity. For instance, the Ninth Circuit in *Mujica* noted that the State Department "articulated several reasons why . . . 'the adjudication of this case [would] have an adverse impact on the foreign policy interests of the United States'"³⁴ and might "give the impression that the U.S. government 'does not recognize the legitimacy'" of judicial institutions in Colombia.³⁵

The Eleventh Circuit was even more explicit in describing the weight it accords the State Department's statements in its international comity analysis. In *GDG Acquisitions, LLC v. Government of Belize*, the Eleventh Circuit held that prospective international comity abstention—the doctrine it applied in *Ungaro-Benages*—is "reserved for exceptional diplomatic circumstances."³⁶ The fact that the Executive branch did not submit a statement of interest, as it did in *Ungaro-Benages*, weighed heavily in the Court's conclusion that international comity abstention was inappropriate.³⁷

The State Department is the "central repeat player in matters affecting this country's affairs" and is therefore better able to evaluate the importance of U.S. relationships with other countries and make sensitive determinations about the fairness of those countries' judicial systems.³⁸ Although statements of interest should not trigger a stay or dismissal on international comity grounds per se, they can and should provide a basis for a presumptive rule.

The existence of an alternative remedial scheme in a foreign forum with a closer connection to the dispute is also a significant consideration in any analysis of international comity. Although the United States has a general interest in overseeing claims filed within its court system, a foreign sovereign with a closer connection to the dispute that has established an integrated remedial scheme will typically have a stronger regulatory interest in overseeing all litigation relating to that scheme, particularly if opt-outs would undermine the objectives underlying the

34. *Mujica v. AirScan, Inc.*, 771 F.3d 580, 609–10 (9th Cir. 2014).

35. *Id.*

36. 749 F.3d 1024, 1026 (11th Cir. 2014).

37. *Id.* at 1032 ("[I]n *Ungaro-Benages* the United States submitted a Statement of Interest No statement of foreign policy interest from the United States appears in the current record, and we can discern no such interest favoring the foreign adjudication of this matter. Thus, the first *Ungaro-Benages* factor weighs against dismissal.').

38. See *Estreicher & Lee*, *supra* note 33, at 198-200.

scheme.³⁹ For instance, the Eleventh Circuit in *Ungaro-Benages* noted that “the German government has a significant interest in having the Foundation be the exclusive forum of these claims.”⁴⁰ More specifically, “Germany . . . had powerful and easily discernible interests in protecting [its] dispute-resolution systems involving thousands of claimants from the corrosion or collapse that would occur if [those] individual claims were handled by [U.S.] federal courts.”⁴¹

As for the argument that the Ninth Circuit’s application of international comity was redundant with the standard *forum non conveniens* analysis, except that plaintiffs did not benefit from the deference courts ordinarily afford to their forum choice,⁴² the overlap may be attributable to the court’s failure to highlight the differences between the purposes underlying the two doctrines. *Forum non conveniens* is about litigation interests: the convenience of the litigants and the burdens on the U.S. forum. Courts conducting a *forum non* analysis consider factors like the burden on the court system and on jurors, the possible difficulty of determining and applying foreign law, and any possible advantage of “having localized controversies decided at home.”⁴³ A dismissal on grounds of international comity, by contrast, looks to both domestic foreign policy interests, as well as important regulatory interests of the foreign forum that are served by having the litigation in its own courts or alternative regimes for resolving disputes.⁴⁴ A court in the U.S. should stay or dismiss an action only when the foreign forum has a significantly stronger regulatory interest than the United States⁴⁵—an interest that is often acknowledged by the U.S. when it files a statement of interest.⁴⁶ If some courts have, in fact, allowed international comity to eclipse *forum non conveniens*, it is because they are improperly conflating litigation interests with regulatory interests.

The Supreme Court of the United States has never directly addressed whether an independent comity analysis is the appropriate mechanism for considering how foreign interests reflected in existing or potential foreign proceedings bear on a U.S. court’s exercise of jurisdiction. However, several Justices of the Court have expressed their own individual views as to whether federal courts can consider international comity

39. See Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 121-24 (2019).

40. *Ungaro-Benages*, 379 F.3d at 1239.

41. Gardner, *supra* note 39, at 122.

42. See Maggie Gardner, *Deferring to Foreign Courts*, 169 U. PENN. L. REV. 2291, 2316 (2022).

43. *Gulf Oil v. Gilbert*, 330 U.S. 501, 509 (1947).

44. See *Mujica v. AirScan, Inc.*, 771 F.3d 580, 598, 609-10 (9th Cir. 2014).

45. *Id.* at 610.

46. *Id.* at 609-10.

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in determining whether to proceed with a case in light of a foreign sovereign's strong reasons in having the case heard in its own system under its own procedures. For example, in *Jesner v. Arab Bank, PLC*, in which a majority of the Court held that foreign corporations were not subject to suit under the Alien Tort Statute (ATS),⁴⁷ four dissenting Justices noted that the Court need not have adopted a prophylactic rule excluding foreign corporations in order to address potential friction because, in an appropriate case, a court could dismiss such a suit “for reasons of international comity, or when asked to do so by the State Department” if there was concern that entertaining the suit would create international friction.⁴⁸

In a concurring opinion in another ATS case, *Kiobel v. Royal Dutch Petroleum Co.*, Justice Breyer observed that even if the statute were interpreted to confer jurisdiction, “[f]urther limiting principles such as exhaustion, forum non conveniens, and comity” were available to minimize international friction.⁴⁹ Likewise, in *Sosa v. Alvarez-Machain*—the first ATS case taken up by the Supreme Court—the Court majority in a footnote referenced an amicus brief filed by the European Commission, arguing that a claimant must exhaust any remedies available in the domestic legal system, and possibly in international claims tribunals, before asserting a claim in a foreign forum for violations of international law.⁵⁰ The Court indicated that it “would certainly consider this requirement in an appropriate case,”⁵¹ and also noted another possible limitation on its jurisdiction: a policy of “case-specific deference to the political branches.”⁵² Thus, although its parameters are somewhat amorphous, the Supreme Court does appear to recognize comity limitations on a U.S. court's assertion of jurisdiction.

III. INTERNATIONAL COMITY ABSTENTION IN EXPROPRIATION CASES

The question of the precise circumstances for invoking comity came before the Supreme Court in 2020 in two cases involving suits against foreign states and their instrumentalities brought pursuant to the Foreign Sovereign Immunities Act: *Simon v. Republic of Hungary*⁵³ and *Philipp v. Federal Republic of Germany*.⁵⁴ Both cases involved the “expropriation”

47. 584 U.S. 241, 243 (2018).

48. *Id.* at 313 (Sotomayor, J., dissenting).

49. 569 U.S. 108, 133 (2013) (Breyer, J., concurring).

50. 542 U.S. 692, 733 n.21 (2004).

51. *Id.*

52. *Id.*

53. 911 F.3d 1172 (D.C. Cir. 2018), *cert. granted*, Republic of Hungary v. Simon, 141 S. Ct. 187 (2020).

54. 894 F.3d 406 (D.C. Cir. 2018), *cert. granted*, Republic of Germany v. Philipp, 141 S. Ct. 185 (2020).

exception to sovereign immunity, which permits suits against foreign states or their instrumentalities to recover for “rights in property taken in violation of international law” when the property has some nexus to the United States.⁵⁵ In addition to the question of whether this particular exception reached takings of property in connection with a pattern of genocide, the Court was asked to consider whether principles of international comity should require plaintiffs to first exhaust remedies that a foreign sovereign might provide in its own territory.

In both *Simon* and *Philipp*, the Court of Appeals for the D.C. Circuit rejected any role for international comity in a case brought pursuant to the Foreign Sovereign Immunities Act, which sets forth the requirements for subject matter and personal jurisdiction over a foreign state or instrumentality.⁵⁶ Although the court of appeals in *Simon* did accept that *forum non conveniens* remains a possible basis for dismissal of a suit brought under the FSIA, it ultimately reversed the district court’s dismissal on *forum non conveniens* grounds for abuse of discretion.⁵⁷ While the Court of Appeals for the D.C. Circuit categorically precluded international comity as a basis for dismissing a suit against a foreign sovereign,⁵⁸ that ruling was challenged in a petition for certiorari to the Supreme Court.⁵⁹

The Supreme Court granted the petition on that point (as well as the issue of “domestic takings”) and for the first time heard arguments on the role of international comity as an independent basis for staying the exercise of jurisdiction both in cases against private parties as well as foreign states. Defendants argued that because international comity was available to private parties, nothing in the Foreign Sovereign Immunities Act precluded its application to foreign states. Defendants pointed to language in the FSIA stating that when a foreign state lacks

55. 28 U.S.C. § 1605(a)(3) (2016). Under § 1605(a)(3), a party must demonstrate four criteria to fit within the exception: (1) rights in property must be at issue in the case; (2) those rights in property must have been “taken”; (3) the taking must have been “in violation of international law”; and (4) the plaintiff’s seized property or proceeds gained from the exchange of the plaintiff’s property must either (i) be present in the United States “in connection with a commercial activity carried on in the United States by the foreign state” or (ii) be “owned or operated by an agency of instrumentality of the foreign state [that] is engaged in commercial activity in the United States.” *Id.*

56. See *Simon*, 911 F.3d at 1190; *Philipp*, 894 F.3d at 415-16.

57. *Simon*, 911 F.3d at 1190. The Supreme Court rejected the petition for certiorari on that issue.

58. *Id.* at 1180-81.

59. Transcript of Oral Argument at 3-5, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (No. 18-1447) (explaining the importance of a role for international comity, and arguing that it is not precluded as a basis for dismissing a case under the FSIA); Transcript of Oral Argument at 14, *Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (No. 19-351) (counsel for Germany echoing the points raised by Hungary in the *Simon* case regarding international comity).

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sovereign immunity, it shall be “liable in the same manner and to the same extent as a private individual under like circumstances.”⁶⁰ For their part, plaintiffs questioned whether comity-based exhaustion or abstention outside of parallel litigation was ever proper even with respect to private defendants and noted that the Supreme Court had never endorsed a stand-alone doctrine of comity as a basis for a stay or dismissal in any type of case.⁶¹ Moreover, plaintiffs argued that even if a dismissal based on comity were available in private cases, it was not appropriate in a suit against a foreign state or instrumentality under the FSIA.⁶²

Plaintiffs relied on a recent Supreme Court case, *Republic of Argentina v. NML Capital, Ltd.*,⁶³ that rejected the invocation of non-textual defenses other than the well-recognized common law doctrine of *forum non conveniens* in an FSIA case.⁶⁴ But in an earlier case brought under the FSIA, *Republic of Austria v. Altmann*, where the Supreme Court held that the FSIA applied to pre-enactment conduct and rejected the foreign state’s argument that such application was impermissibly retroactive, the Court observed that “nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity.”⁶⁵ Justice Kennedy dissented on the retroactivity point and criticized the majority’s suggestion that the assertion of such jurisdiction could be tempered by Executive intervention.⁶⁶ Justice Kennedy emphasized that such Executive involvement was inconsistent with the history of the FSIA, which was intended to remove the Executive from decisions about immunity.⁶⁷

Any opportunity for the Supreme Court to provide guidance on the role for international comity was lost when the Court reversed the D.C.

60. Transcript of Oral Argument at 11-12, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (No. 18-1447); *see also* 28 U.S.C. § 1606.

61. *See, e.g.*, Transcript of Oral Argument at 52-72, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (No. 18-1447).

62. *Id.*

63. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014).

64. *See, e.g.*, Brief for Petitioners at 12, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (No. 18-1447).

65. *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

66. *Id.* at 715, 733-38 (Kennedy, J., dissenting).

67. *Id.* at 716-17 (Kennedy, J., dissenting) (explaining that the FSIA grew out of “years of academic and legislative effort to establish a consistent framework for the determination of sovereign immunity when foreign nations are haled into our courts” and that the legislation sought to limit the need for any input from the executive branch by establishing clear rules—and exceptions—to the application of sovereign immunity principles that would enable courts to make decisions independently).

Circuit's decisions in *Simon* and *Philipp* on the basis of the domestic takings exception to the expropriation provision of the FSIA, and thus managed to avoid the comity issue altogether.⁶⁸

Likewise, the Seventh Circuit largely sidestepped questions raised about the role for international comity in *Scalin v. Société Nationale des Chemins de fer Francais*,⁶⁹ another FSIA case in which, unlike in *Simon* and *Philipp*,⁷⁰ the United States filed a Statement of Interest in the district court urging dismissal of the case on that basis. *Scalin* was an action brought under the FSIA by heirs of deportees against the French national railroad for allegedly expropriating property of the deportees aboard the trains that were transporting them from France to extermination camps. In its Statement of Interest before the district court, the United States urged dismissal of the U.S. action based on international comity because plaintiffs failed to exhaust remedies available through a commission established by France that provides compensation for property confiscated during the Holocaust. The district court held that France offered adequate remedies for the plaintiffs' claims and that, under prior Seventh Circuit precedent,⁷¹ plaintiffs must pursue those remedies in France before suing SNCF under the FSIA in the United States.⁷² Plaintiffs appealed that decision to the Court of Appeals for the Seventh Circuit. David (along with Paul Stephan) filed an amicus brief in support of Defendant SNCF. Their brief observed that "[d]octrines of prudential abstention or dismissal based on principles of international comity are well developed in federal court jurisprudence."⁷³ The brief also pointed out that the Supreme Court in other cases had endorsed the application of principles of international comity to address the legitimate concerns of foreign sovereigns in cases where the FSIA did not afford immunity.⁷⁴

68. *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 169 (2021); *Republic of Hungary v. Simon*, 592 U.S. 207, 208 (2021).

69. No. 15-cv-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018), *aff'd*, 8 F.4th 509 (7th Cir. 2021).

70. The United States did not file a Statement of Interest in either of those cases, although it did file an Amicus Brief in the Supreme Court arguing that a dismissal on comity is not precluded under the FSIA. See Brief for the United States as Amicus Curiae Supporting Petitioners at 31, *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021) (No. 19-351); Brief for the United States as Amicus Curiae Supporting Petitioners at 29, *Republic of Hungary v. Simon*, 592 U.S. 207 (2021) (No. 23-867).

71. See *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 859–62 (7th Cir. 2015); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 697 (7th Cir. 2012).

72. *Scalin*, 2018 WL 1469015, at *8.

73. Brief for Stephan & Stewart as Amici Curiae Supporting Defendant-Appellee at 16, *Scalin v. Société Nationale des Chemins de Fer Français*, No. 15-cv-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018) (No. 18-1887).

74. *Id.* at 16-17.

ADJUDICATORY COMITY

The appeal in *Scalin* was stayed pending the Supreme Court's disposition in *Simon* and *Philipp*, and when the appeal finally reached the Seventh Circuit, the appeals court also avoided confronting the comity point head-on. Judge Easterbrook's opinion acknowledged that "[w]hether the French system of compensation for wartime thefts justifies abstention was the principal subject briefed and argued in [the] appeal,"⁷⁵ but ultimately upheld the district court's dismissal on the ground that Section 1605(a)(3) of the FSIA (the expropriation exception) does not provide a cause of action for 'triple-foreign' suits.⁷⁶ Judge Easterbrook did give a nod to the Seventh Circuit's international comity jurisprudence, explaining that if an appropriate merits claim *had* been raised, comity concerns would justify abstention.⁷⁷ Raising considerations akin to those in *Mujica*, Judge Easterbrook observed that "[a] system in which a single district judge could countermand the decisions of multiple nations about what remedies are appropriate . . . would be unfortunate."⁷⁸ Judge Easterbrook invoked the State Department's *Amicus* Brief supporting the defendant's motion to dismiss, suggesting that the case "call[ed] into question the relations between the United States and one of its allies" and that the "Executive Branch, not the Judicial Branch, is responsible for foreign relations."⁷⁹ Because plaintiffs failed to state an appropriate substantive claim in *Scalin*, Judge Easterbrook found it "unnecessary" to further elaborate on the matter.⁸⁰

IV. CONCLUSION

Courts will continue to confront the question of the propriety of dismissing a case on grounds of international abstention until the issue is resolved by the Supreme Court. Professor Stewart's important contributions to the understanding of this issue in the context of expropriation under the Foreign Sovereign Immunities Act will provide important guidance.

75. *Scalin*, 8 F.4th at 511.

76. *Id.* at 514. A "triple-foreign" or "foreign-cubed" suit is one where a "foreign plaintiff sues a foreign defendant for conduct taking place entirely outside of the United States." See Clara Petch, *What Remains of the Alien Tort Statute after Nestlé USA, Inc. v. Doe?*, 42 NW. J. INT'L L. & BUS. 397, 409 (2022).

77. *Scalin*, 8 F.4th at 514.

78. *Id.*

79. *Id.* ("One can only imagine the fury in this nation if a French judge were to prescribe how much the United States must pay, and to whom, for the removal of Japanese Americans from the West Coast during World War II or the Trail of Tears in the nineteenth century. Each nation can decide for itself (unilaterally or through treaties) whether reparations for long-past injuries are appropriate.")

80. *Id.*