

[ARGUED MAY 2, 2018; DECIDED JULY 10, 2018]

No. 17-7064, consolidated with No. 17-7117

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ALAN PHILIPP, ET AL.,

Plaintiffs-Appellees,

v.

FEDERAL REPUBLIC OF GERMANY, a foreign state; and
STIFTUNG PREUSSISCHER KULTURBESITZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF REHEARING EN BANC**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellees are Alan Philipp, Gerald G. Stiebel, Jed R. Leiber. The defendants-appellants are the Federal Republic of Germany and Stiftung Preußischer Kulturbesitz. Amicus curiae are David Toren and the United States of America.

B. Rulings Under Review

The ruling under review is the district court's March 31, 2017 order denying a motion to dismiss the action, for the reasons set forth in the accompanying memorandum opinion. The decision is published at 248 F. Supp. 3d 59 (D.D.C. 2017), and is reprinted at Joint Appendix 310-51.

C. Related Cases

On April 21, 2017, defendants filed a notice of appeal regarding the district court's decision, which was assigned case number 17-7064. At the same time, defendants moved the district court to certify the entirety of its decision for interlocutory appeal under 28 U.S.C.

§ 1292(b). The district court granted defendants' motion on May 18, 2017, and so certified its opinion. *See Philipp v. Federal Republic of Germany*, 253 F. Supp. 3d 84 (D.D.C. 2017). On May 30, defendants filed a petition with this Court asking the Court to accept an interlocutory appeal of the entirety of the district court's decision. That petition was assigned case number 17-8002. On August 1, this Court granted Defendants' petition. The district court then filed this Court's order as a separate notice of appeal, which was assigned case number 17-7117. On August 4, this Court consolidated cases 17-7064 and 17-7117.

There appear to be no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). However, there have been a number of other cases that raised similar legal issues, including *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), and *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42 (D.D.C. 2017), *appeal docketed*, No. 17-7146 (D.C. Cir. Oct. 23, 2017).

/s/ Casen B. Ross
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INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(b)(2), the United States submits this brief as amicus curiae in support of rehearing en banc.

The United States deplores the wrongdoings committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered. Since the end of World War II, the United States has worked in numerous ways to achieve some measure of justice. With the United States' encouragement, the German government has provided roughly \$100 billion (in today's dollars) to compensate Holocaust survivors and other victims of the Nazi era.

The United States has not been involved in efforts to resolve plaintiffs' specific property claims, but it hosted the conference that produced the Washington Conference Principles on Nazi-Confiscated Art, *see* U.S. Dep't of State, <https://go.usa.gov/xPYUU> (last visited Sept. 15, 2018), in accordance with which Germany established an Advisory Commission to resolve disputes regarding cultural assets seized by the Nazi regime.

The United States takes no position on whether the Advisory Commission correctly decided not to recommend the return of the property at issue here, or whether the district court correctly denied the defendants' motion to dismiss. The United States files this brief as *amicus curiae*, however, to express its view that a district court may, in an appropriate case, abstain on international comity grounds from exercising jurisdiction over claims brought under the expropriation exception to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1605(a)(3). Comity-based abstention may be appropriate where litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government.¹

The panel erred in holding that the FSIA “leaves no room” for a court to abstain from exercising jurisdiction as a matter of international comity. Slip Op. 17. The FSIA comprehensively addresses foreign sovereign immunity, but does not displace other areas of law, including comity-based abstention. The panel relied on *Republic of Argentina v.*

¹ The defendants' rehearing petition (at 11-19) also asks the Court to review its decision in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). The United States takes no position on whether the court should grant rehearing on this issue.

NML Capital, Ltd., 134 S. Ct. 2250 (2014), but there, the foreign state claimed immunity under the FSIA, and the Court expressly noted that a court “may appropriately consider comity interests” in resolving non-immunity issues relating to post-judgment discovery. *Id.* at 2258 n.6.

These interests may similarly be considered by a court when it is asked to abstain on comity grounds. The provisions of the FSIA that the panel relied on do not suggest Congress intended to bar considerations of comity, a common-law doctrine that courts have applied for centuries.

ARGUMENT

THE FSIA DOES NOT PROHIBIT A DISTRICT COURT FROM ABSTAINING AS A MATTER OF INTERNATIONAL COMITY FROM EXERCISING JURISDICTION OVER A CLAIM BROUGHT UNDER THE FSIA’S EXPROPRIATION EXCEPTION.

A. United States courts have long recognized the doctrine of international comity, which permits courts to recognize the “legislative, executive or judicial acts of another nation” giving “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.”

Hilton v. Guyot, 159 U.S. 113, 164 (1895); *see also id.* at 164-65 (citing Joseph Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834) (describing international comity as a doctrine of “beneficence,

humanity, and charity,” which “arise[s] from mutual interest and utility”)); *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370, n.* (1798) (referring to the doctrine of comity of nations).

International comity discourages a U.S. court from second-guessing a foreign government’s judicial or administrative resolution of a dispute (or provision for its resolution), or otherwise sitting in judgment of a foreign government’s official acts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (“To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.”). One strand of comity is “adjudicatory comity,” pursuant to which a U.S. court may abstain from exercising jurisdiction in deference to adjudication in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). This doctrine is one of “prudential abstention,” applied “when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.” *Id.* at 598 (quotations omitted).

In enacting the FSIA, Congress established a comprehensive legal framework governing the immunity of foreign states from the jurisdiction of U.S. courts. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). But the Act was not meant to affect substantive liability or other areas of law. *See Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017) (“[T]he FSIA * * * grant[ed] jurisdiction yet le[ft] the underlying substantive law unchanged.” (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983))).

Along these lines, “the doctrine of *forum non conveniens* remains fully applicable in FSIA cases.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002). And this Court has recognized that other common-law principles continue to apply in cases against foreign states following the FSIA’s enactment. *See, e.g., Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008) (*forum non conveniens* and act-of-state doctrine); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (political question doctrine).

This Court has also observed that litigation under the FSIA may involve sensitive questions of foreign affairs that “obviously occasion a continuing involvement by the Executive * * * in matters relating to the application of the act of state doctrine and giving appropriate weight to those views.” *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citations omitted).

Abstention on the basis of international comity, like *forum non conveniens*, is not a jurisdictional doctrine but instead a federal common-law doctrine of abstention in deference to an alternative forum. *See In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998) (“Forum non conveniens does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction.”). And like the act-of-state doctrine, adjudicatory comity is grounded in concerns that a court’s adjudication of a claim may improperly impinge on the sovereignty of a foreign nation. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-39 (1964) (distinguishing between court’s jurisdiction over claim against foreign state for expropriation, and the court’s application of the act-of-state doctrine to decline to examine the merits). Nothing in the text or history of the FSIA suggests that it was

intended to foreclose application of those longstanding common-law doctrines.

Significantly, abstention on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing that a federal court may decline to exercise jurisdiction in deference to predominant State interests under various abstention doctrines, including *Pullman* and *Younger* abstention); *see also id.* at 723 (noting that comity-based abstention stems from a similar premise as *forum non conveniens*). Just as the “longstanding application of [federalism-based abstention] doctrines reflects the common-law background against which the statutes conferring jurisdiction were enacted,” *Id.* at 717—that Congress should not be presumed to have intended to override absent clear evidence to the contrary, *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)—a court should not presume from statutory silence that the FSIA’s immunity provisions were intended to abrogate comity-based abstention. The panel offered no explanation why federal courts should be able to abstain from

exercising jurisdiction in deference to a State's interests, but not in deference to the interests of a foreign sovereign.

Notably, the Supreme Court has explicitly left open the possibility that the United States could suggest that “courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity,” *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)—abstention based on international comity could be such a basis. *See id.* at 702 (explaining that the Court would give deference to the Executive Branch's foreign policy views in deciding whether to exercise jurisdiction under the FSIA).

Jurisdiction under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), is unusual in that it typically involves claims alleging international-law violations committed in a foreign state, rather than purely private-law disputes ordinarily brought under the FSIA's other exceptions to sovereign immunity, in which the relevant action (or at least the gravamen of the claim) took place in the United States. This exception thus contemplates particular solicitude for international comity and consideration for whether a plaintiff had exhausted remedies in the country where the alleged expropriation took place. At

the very least, the text and history of the FSIA afford no reason to foreclose a court from abstaining as a matter of comity.

B. The Supreme Court's decision in *NML Capital*, 134 S. Ct. 2250, does not preclude a court from abstaining based on adjudicatory comity in a case in which the court has jurisdiction under the FSIA. In *NML Capital*, the Court addressed "[t]he single, narrow question * * * whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state." 134 S. Ct. at 2255. The Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text," and that the FSIA does not "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Id.* at 2256. The Court noted the concerns raised by Argentina and the United States in arguing for a contrary statutory interpretation regarding the potential affront to foreign states' sovereignty and to international comity resulting from sweeping discovery orders, but held that only Congress could amend the statute to address those concerns. *Id.* at 2258.

The panel relied on *NML Capital* to conclude that, if a court has jurisdiction under the FSIA, it may not abstain from exercising that jurisdiction on comity grounds. Slip Op. 16-17. To be sure, *NML Capital* held that a foreign state's immunity is governed by the FSIA. But the Supreme Court also expressly recognized that, even where a court has jurisdiction under the FSIA, comity might be relevant to other non-immunity determinations in the litigation. *NML Capital*, 134 S. Ct. at 2258 n.6 (“[W]e have no reason to doubt that [a court] may appropriately consider comity interests” in determining the appropriate scope of discovery.).

A court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune. *See, e.g., Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015) (explaining that comity is not “a special immunity defense found in the FSIA”); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008) (distinguishing between foreign state's claim to sovereign immunity under the FSIA and its “unique interest in resolving the ownership of or claims to” assets wrongfully taken). The panel thus

erred by reading *NML Capital* to resolve an issue not addressed in that case to foreclose application of a long-recognized abstention doctrine.

C. The panel also relied on two provisions of the FSIA in holding that the statute precludes abstention on comity grounds. Neither supports the panel's conclusion.

First, the panel pointed to the FSIA's terrorism exception, which requires a plaintiff in some circumstances to "afford[] [a] foreign state a reasonable opportunity to arbitrate" before bringing suit. 28 U.S.C. § 1605A(a)(2)(A)(iii). The panel reasoned by negative implication that, because a district court *must* dismiss such a claim brought under the FSIA's terrorism exception if the claim is not appropriately exhausted, a district court *cannot* dismiss a claim for failure to exhaust in a foreign forum. Slip Op. 15.

There is no evidence, however, that in enacting the terrorism exception some twenty years after the FSIA was originally enacted, Congress intended to foreclose the possibility that a court might abstain from exercising jurisdiction under other exceptions based on common-law abstention. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. The Act's

expropriation exception does not require exhaustion, but neither does it forbid a court from abstaining in deference to an alternative forum. The panel's reasoning would also appear to foreclose dismissal on *forum non conveniens* grounds, despite binding circuit precedent to the contrary. *Price*, 294 F.3d at 100.

Furthermore, abstention on comity grounds is not, as the panel seemed to understand it, an exhaustion requirement. Rather, it reflects the principle that, in an appropriate case, a foreign sovereign may have a greater interest in resolving a particular dispute than does the United States, and U.S. interests are better served by deferring to that sovereign's interests. That may mean deferring to an alternative forum, *e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); deferring to a foreign law that strips plaintiffs of standing to bring suit, *e.g.*, *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); or giving conclusive weight to the foreign state's resolution of a dispute, *e.g.*, *Mujica*, 771 F.3d at 614-15. The FSIA requirement to arbitrate terrorism claims before bringing suit does not suggest that Congress intended to prohibit a court from

deferring to the foreign state's interests in a claim brought under a different provision of the Act.

The panel also erred in claiming support for its position from 28 U.S.C. § 1606, which provides that, “[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under [28 U.S.C. §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,” with the exception of punitive damages. Slip Op. 15-16. The panel appeared to believe that provision requires a court to treat foreign states the same as private defendants. Slip Op. 16 (“[Section 1606] permits only defenses * * * that are equally available to private individuals”).

Even under the panel's reasoning, its conclusion was erroneous. Just as private individuals may invoke *forum non conveniens* as a basis for a court to abstain from exercising jurisdiction, *see* Slip Op. 16, private parties may similarly seek abstention on the basis of adjudicatory comity. *See, e.g., Mujica*, 771 F.3d at 615; *Ungaro-Benages*, 379 F.3d at 1238. In asserting that a private individual cannot invoke a

sovereign's right to resolve disputes against it, the panel construed comity far more narrowly than the doctrine has been applied.

The panel erred in ruling that a court may not abstain, on international comity grounds, from adjudicating a claim over which the court has jurisdiction under the FSIA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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September 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(4) and 29(b)(4) because it contains 2,537 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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