

No. 18-1887

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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KAREN SCALIN, *et al.*,

Plaintiffs-Appellants,

v.

SOCIÉTÉ NATIONALE DES CHEMINS DE FER FRANÇAIS,

Defendant-Appellee.

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On Appeal from the United States District Court  
for the Northern District of Illinois, No. 1:15-cv-03362 (Wood, J.)

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING APPELLEE**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTERESTS OF THE UNITED STATES .....	1
STATEMENT OF THE ISSUES.....	2
PERTINENT STATUTES AND REGULATIONS .....	2
STATEMENT OF THE CASE.....	3
I.    Nature of the Case.....	3
II.   Statutory Background.....	3
III.  Factual Background.....	4
IV.   Prior Proceedings.....	4
SUMMARY OF ARGUMENT.....	9
STANDARD OF REVIEW .....	12
ARGUMENT .....	12
I.    Dismissal Is Appropriate as an Exercise of International Comity.....	12
II.   Dismissal Also Is Appropriate Under the <i>Forum Non Conveniens</i> Doctrine.....	24
III.  Plaintiffs Failed to Allege Facts Supporting Jurisdiction Under the Expropriation Exception.....	26
CONCLUSION .....	28
ADDENDUM	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

### Cases

<i>Abelesz v. Magyar Nemzeti Bank,</i> 692 F.3d 661 (7th Cir. 2012) .....	8, 13, 14, 15
<i>Argentine Republic v. Amerada Hess Shipping Corp.,</i> 488 U.S. 428 (1989) .....	3
<i>Ashcroft v. Iqbal,</i> 556 U.S. 662 (2009) .....	27
<i>Asociacion de Reclamantes v. United Mexican States,</i> 735 F.2d 1517 (D.C. Cir. 1984).....	13
<i>Astoria Fed. Sav. &amp; Loan Ass’n v. Solimino,</i> 501 U.S. 104 (1991) .....	24
<i>Bolivarian Republic of Venezuela v. Helmerich &amp; Payne Int’l Drilling Co.,</i> 137 S. Ct. 1312 (2017) .....	28
<i>Cooper v. Tokyo Electric Power Co.,</i> 860 F.3d 1193 (9th Cir. 2017) .....	17, 19
<i>F. Hoffmann-La Roche Ltd. v. Epagran S.A.,</i> 542 U.S. 155 (2004) .....	16
<i>Fischer v. Magyar Államvasutak ZRT.,</i> 777 F.3d 847 (7th Cir. 2015) .....	8, 12, 13, 14, 15, 19, 20, 24, 25, 26
<i>Goldberg v. United States,</i> 881 F.3d 529 (7th Cir. 2018) .....	12
<i>Hilton v. Guyot,</i> 159 U.S. 113 (1895) .....	16
<i>In re Maxwell Commc’n Corp.,</i> 93 F.3d 1036 (2d Cir. 1996).....	17
<i>Locke v. Haessig,</i> 788 F.3d 662 (7th Cir. 2015) .....	19, 24

<i>Mujica v. AirScan Inc.</i> , 771 F.3d 580 (9th Cir. 2014) .....	16, 17, 18
<i>Norex Petroleum Ltd. v. Access Indus., Inc.</i> , 416 F.3d 146 (2d Cir. 2005) .....	25
<i>Philipp v. Federal Republic of Germany</i> , 894 F.3d 406 (D.C. Cir. 2018) .....	21, 22, 23
<i>Quackenbush v. Allstate Ins. Co.</i> , 517 U.S. 706 (1996) .....	23, 24
<i>Republic of Argentina v. NML Capital, Ltd.</i> , 134 S. Ct. 2250 (2014) .....	22, 23
<i>Silba v. ACT, Inc.</i> , 807 F.3d 169 (7th Cir. 2015) .....	26, 27
<i>Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.</i> , 549 U.S. 422 (2007) .....	25
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004) .....	13
<i>Ungaro-Benages v. Dresdner Bank AG</i> , 379 F.3d 1227 (11th Cir. 2004) .....	16, 17, 18

## Statutes

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602-1611 .....	3
28 U.S.C. § 1604 .....	3
28 U.S.C. § 1605 .....	3
28 U.S.C. § 1605(a)(3) .....	3, 4
28 U.S.C. § 1607 .....	3

## Rules

7th Cir. R. 40(e) .....	15
-------------------------	----

## Legislative Materials

H.R. Rep. No. 94-1487 (1976) .....	22
------------------------------------	----

## International Materials

Agreement Between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims of Holocaust-related Deportation from France Who Are Not Covered by French Programs, Dec. 8, 2014, T.I.A.S. No. 15-1101 .....	6
Pmbl. ....	7
<i>Interhandel</i> (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6 (Mar. 21) .....	14

## Other Authorities

Brief for the United States as Amicus Curiae in Support of Rehearing En Banc, <i>Philipp v. Federal Republic of Germany</i> , 894 F.3d 406, 2018 WL 4385105 (D.C. Cir. Sept. 14, 2018) (No. 17-7064) .....	22
Decl. of Stuart E. Eizenstat, Deputy Secretary of the Treasury and Special Representative to the President and Secretary of State on Holocaust Issues (Jan. 19, 2001) .....	5
Restatement (Third) of the Foreign Relations Law of the United States (Am. Law Inst. 1987) .....	13
§ 712 .....	13
§ 713 .....	13
§ 713 cmt. f .....	13

## INTERESTS OF THE UNITED STATES

The United States has the deepest sympathy for the victims of atrocities committed during the Holocaust and for their family members. And the United States government has long been committed to supporting victims and their families in obtaining a measure of justice for the injuries they suffered. The United States' longstanding policy favors resolution of Holocaust-related claims through adequate mechanisms established by the foreign states in which the claims arose. The United States' policy is also to favor non-adversarial mechanisms that provide benefits to more victims, and that do so faster and with less uncertainty than does litigation, thus facilitating the two primary goals of U.S. policy in this area—justice and urgency. The United States accordingly files this brief as *amicus curiae* to urge affirmance of the district court's dismissal of plaintiffs' Holocaust-related claims against Société Nationale des Chemins de Fer Français (SNCF), the French national railroad.

As the district court recognized, France has established an administrative remedy that can resolve plaintiffs' claims. Following this Court's precedent, the district court dismissed the action on what it construed to be an international-law doctrine of exhaustion. In the views of the United States, this Court should affirm on the related but distinct doctrine of international comity, or, in the alternative, on the basis of *forum non conveniens* or for lack of subject-matter jurisdiction. The United States has a substantial interest in the proper interpretation and application of customary international law, and of the international comity and *forum non conveniens*

doctrines. The United States also has a significant interest in the proper interpretation and application of the expropriation exception in the Foreign Sovereign Immunities Act (FSIA), which plaintiffs invoked as the basis for the district court's jurisdiction. The application of those legal principles have implications for the treatment of the United States in foreign courts, and for its relations with other sovereigns. Proper application of customary international law and those doctrines and jurisdictional provisions also serve to protect the foreign policy interests of the United States and the legitimate interests of foreign states.

### **STATEMENT OF THE ISSUES**

1. Whether this Court should affirm the district court's dismissal of plaintiffs' claims under the international comity doctrine, in light of the alternative administrative remedy available in France;
2. Whether the district court's judgment should be affirmed on the alternative basis of *forum non conveniens*; and
3. Whether plaintiffs failed adequately to allege jurisdiction under the FSIA's expropriation exception.

### **PERTINENT STATUTES AND REGULATIONS**

The FSIA's expropriation exception provides that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case \* \* \* in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the

United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3).

## STATEMENT OF THE CASE

### I. Nature of the Case

This appeal involves a putative class-action suit brought by the heirs of French Holocaust victims transported by SNCF, now a French state instrumentality, to Nazi concentration camps. Plaintiffs seek to hold SNCF liable and to obtain damages for SNCF's alleged expropriation of the victims' property. The district court dismissed plaintiffs' suit for failure to exhaust available remedies in France.

### II. Statutory Background

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602-1611, is the sole basis for establishing subject-matter jurisdiction in a civil action against a foreign state and its agencies or instrumentalities (collectively, foreign state) in courts in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, a foreign state is immune from jurisdiction unless a claim against it falls within one of the statute's enumerated exceptions. 28 U.S.C. § 1604; *see id.* §§ 1605, 1607. Plaintiffs invoked the expropriation exception as the basis for the district court's jurisdiction. *See* App'x A3-A4. That exception, quoted above, withdraws a foreign state's immunity from suits in which plaintiffs



properly put “in issue” claims that the foreign state took property “in violation of international law,” and there is a specified commercial-activity nexus to the United States. 28 U.S.C. § 1605(a)(3).

### **III. Factual Background**

Plaintiffs’ complaint alleged the following: During the Second World War, France deported Jews and other “undesirables” to Nazi concentration camps. App’x A1-A2. SNCF operated the trains that transported the deportees to the camps. App’x A2. Deportees were permitted to take personal property with them, but SNCF confiscated that property, keeping some of it and transferring some of it to the Nazis in exchange for cash and good will. *Id.* SNCF retains that property or the proceeds from that property to this day. *Id.* Plaintiffs further allege that they “believe[]” that SNCF took their relatives’ property, and that the taking was part of the Nazi genocide against Jews, in violation of international law, and without just compensation. Dkt. No. 1, ¶¶ 16-18 (Compl.); App’x A2.

### **IV. Prior Proceedings**

A. SNCF filed a motion to dismiss, asserting various jurisdictional and other threshold bars to suit. App’x A1. The United States filed a statement of interest in support of SNCF’s motion to dismiss. Dkt. No. 63. The United States urged dismissal of plaintiffs’ claims on the grounds of *forum non conveniens*, international comity, prudential exhaustion, and lack of subject-matter jurisdiction under the FSIA. *Id.* at 9-20.

The statement of interest explained the United States' longstanding policy supporting resolution of Holocaust-related claims through reparation mechanisms established by the foreign states in which the claims arose. Dkt. No. 63, at 1-2; *see* Addendum (Add.) A1-A19 (Decl. of Stuart E. Eizenstat, Deputy Secretary of the Treasury and Special Representative to the President and Secretary of State on Holocaust Issues (Jan. 19, 2001)).<sup>1</sup> France first created a reparation program in 1948, which principally established a pension program for French nationals deported during the Holocaust. Dkt. No. 63, at 2-3. In 1999, France established the Commission for the Compensation of Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force during the Occupation (known as CIVS, its French acronym). *Id.* at 3. CIVS provides compensation for spoliation by the Vichy government or occupying Nazi forces. *Id.* The next year, France created a payment program for those who were minors when they lost a parent through deportation and subsequent murder. *Id.* at 4. In 2014, the United States entered into an executive agreement with

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<sup>1</sup> As Mr. Eizenstat explained, “[a]s a matter of policy, the United States Government believes that concerned parties, foreign governments, and nongovernmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation.” Add. A1. That remains the policy of the United States. For the Court’s convenience, we have included in an addendum to this brief a copy of Mr. Eizenstat’s declaration, which was attached as an exhibit to the United States’ statement of interest.

France to extend the 1948 pension program to cover deportees, surviving spouses of deportees, and the estates of both, who are U.S. citizens or certain other non-nationals of France, funded by France and administered by the United States. *Id.* at 5-7; Add. A20-41 (Agreement Between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims of Holocaust-related Deportation from France Who Are Not Covered by French Programs, Dec. 8, 2014, T.I.A.S. No. 15-1101) (2014 Executive Agreement).<sup>2</sup>

The CIVS program is of particular relevance to this litigation. As described by the district court, the program is available to claimants of any nationality, and to heirs of the victims.<sup>3</sup> App'x A7. The procedures for submitting a claim are informal. *See* App'x A7-A8. Claimants need not personally appear, though they may be represented by counsel. App'x A8. CIVS investigates claims on behalf of the claimants, conducting research in specialized archives. App'x A7. Because evidence of loss is not always possible to obtain, CIVS often relies on good-faith estimates of value. *Id.* CIVS employs relaxed evidentiary standards, and can recommend compensation even in the absence of evidence. App'x A12. Rapporteurs—sitting or retired judges—

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<sup>2</sup> For the Court's convenience, we have included in the addendum to this brief the 2014 Executive Agreement, which was attached as an exhibit to the United States' statement of interest.

<sup>3</sup> In describing the CIVS program, the district court relied on the declaration of Michel Jeannoutot, the CIVS Chairman. App'x A6.

supervise the investigation and prepare compensation proposals based on the nature and extent of the property loss. App'x A7. CIVS then conducts a hearing, in which claimants may participate. App'x A7-A8. The hearings are sometimes held outside of France to facilitate claimants' participation. App'x A8. CIVS then makes a compensation recommendation to the French Prime Minister. *Id.* Favorable decisions result in payment; adverse decisions may be appealed to the French courts. *Id.* Although CIVS has no record of any claim related to spoliation by SNCF, the current CIVS Chairman submitted declarations in this litigation stating that such claims would be eligible for compensation under the program. *Id.*

The United States' statement of interest further explained that the 2014 Executive Agreement underscores the United States' and France's intent that Holocaust-related claims be resolved through nonjudicial means. Dkt. No. 63, at 7. The 2014 Executive Agreement reiterated France's "commit[ment] to providing compensation for the wrongs suffered by Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs." A21 (2014 Exec. Agm't, Pmbl.). The agreement stated the parties' shared resolve to address compensation claims of Holocaust victims and their families in "an amicable, extra-judicial and non-contentious manner." A22 (2014 Exec. Agm't, Pmbl.). It recognized that France "should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere." *Id.*

And it stated “the Parties’ intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France.” *Id.*

B. The district court granted SNCF’s motion to dismiss on exhaustion grounds, without considering international comity or *forum non conveniens* arguments. As the district court explained, under this Court’s precedent, a plaintiff asserting a claim of expropriation in violation of international law must exhaust remedies in the expropriating state, or demonstrate that there are no available remedies or that existing remedies are inadequate. App’x A4-A5 (discussing *Fischer v. Magyar Államvasutak ZRT.*, 777 F.3d 847, 854 (7th Cir. 2015) and *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 681 (7th Cir. 2012)).

Plaintiffs’ principal contention was that they should not be required to exhaust French remedies because the CIVS program provides an inadequate means for the resolution of their expropriation claims. *See* App’x A9-A12. They argued that claims related to spoliation by SNCF do not fall within CIVS’s jurisdiction, a contention supported, they said, by the absence of any record of CIVS’s consideration of such claims. App’x A6, A9. Plaintiffs also relied on the declarations of two individuals who have represented claimants before CIVS, who found fault with CIVS’s process in practice. App’x A10-A12.

The district court rejected plaintiffs’ argument concerning the scope of CIVS’s jurisdiction because it was inconsistent with the CIVS Chairman’s representation that

CIVS can consider plaintiffs' claims. App'x A17. In addition, the court concluded that plaintiffs' arguments about the program's flaws were based on speculation and anecdotal evidence rather than inherent deficiencies in the CIVS program. App'x A23; *see* App'x A18-A22 (discussing adequacy of CIVS program). In so ruling, the district court relied on the United States' representation that it finds the CIVS program to be an adequate mechanism for addressing plaintiffs' claims, and the United States' policy that claims such as plaintiffs' should be resolved by mechanisms established by the states involved.<sup>4</sup> App'x A22-A23. For these reasons, the district court dismissed plaintiffs' complaint for failure to exhaust available remedies in France.

## SUMMARY OF ARGUMENT

I. The District Court dismissed plaintiffs' suit for failure to exhaust remedies in France, in light of plaintiffs' ability to seek compensation for their alleged harms through the CIVS program. This Court has held that customary international-law principles require plaintiffs to exhaust foreign remedies before bringing suit in the United States asserting international-law violations. In the view of the United States,

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<sup>4</sup> The district court also noted an amicus brief in support of SNCF filed by the Conseil Représentatif des Institutions Juives de France (CRIF), an umbrella organization representing over sixty Jewish institutions in France. App'x A16. CRIF's brief supported France's acceptance of responsibility for Holocaust-era atrocities, and its reparation programs. *Id.* CRIF also argued that CIVS provides an adequate mechanism for addressing plaintiffs' claims. *Id.*

this Court's holdings appropriately recognize that a district court may decline to exercise jurisdiction in a case based on the expropriation exception when a plaintiff fails to exhaust foreign remedies. To the extent this Court has relied on the customary international law of diplomatic protection, however, those principles do not apply in litigation brought by private individuals against a foreign state.

This Court should affirm the district court's judgment, however, because this Court's decisions also identify international comity as a ground for dismissal for failure to exhaust foreign remedies. In contrast to mandatory exhaustion under diplomatic-protection principles, international comity requires exhaustion as a prudential matter. In considering the propriety of dismissal on international comity grounds, a court considers the interests of the United States and the foreign state, and the adequacy of the foreign forum. There is little question that the United States' and France's interests favor resolution of plaintiffs' claims in France. Both countries have a strong policy favoring resolution of Holocaust-related claims arising in France in the fora that France established to address those claims. There also is little question that the CIVS program provides an adequate alternative forum, given its informal procedures, assistance to claimants, and relaxed standards of evidence.

II. Alternatively, this Court may affirm the district court's judgment under the *forum non conveniens* doctrine. A court may dismiss a suit on *forum non conveniens* grounds if public and private interests support resolution of the claims in an adequate alternative forum. Private interests include the relative ease of access to sources of

proof; the availability of effective administrative procedures for presenting evidence to the adjudicator; and ease of enforcement. Public interests include the interest in having local disputes decided locally; application of local law by a local forum; and avoidance of problems stemming from conflicts of law or application of foreign law.

Although there is a presumption in favor of plaintiffs' chosen forum, that presumption is significantly weaker when the plaintiffs do not sue in their home forum. Here, two of the three plaintiffs are citizens and residents of France. Moreover, CIVS is an adequate forum, and the interests rebut any preference in favor of plaintiffs' choice of forum. Sources of proof are in France, CIVS provides assistance in finding relevant evidence, and awards are made without the need for compulsory process. In addition, France has a significant interest in resolving claims concerning atrocities committed on its territory, and a judgment in plaintiffs' favor would conflict with the United States' longstanding position favoring resolution of Holocaust-related claims through administrative remedies provided by foreign states rather than through litigation in U.S. courts.

III. Finally, this Court may affirm because the district court lacked jurisdiction. To establish jurisdiction under the expropriation exception, plaintiffs must adequately allege that the foreign state took property in violation of international law. That requires factual allegations that plausibly support the existence of subject-matter jurisdiction, not simply formulaic recitations of the elements of jurisdiction. Plaintiffs' allegations fail to meet that requirement.



## STANDARD OF REVIEW

This Court reviews for an abuse of discretion the district court's determination that dismissal for failure to exhaust foreign remedies is appropriate because CIVS is an adequate forum for plaintiffs' claims, and that the interests of the United States and France favor dismissal of plaintiffs' claims in favor of resolution by CIVS. *See Fischer v. Magyar Államvasutak ZRT.*, 777 F.3d 847, 866 (7th Cir. 2015). The Court reviews the district court's legal conclusions de novo. *See, e.g., Goldberg v. United States*, 881 F.3d 529, 531 (7th Cir. 2018).

## ARGUMENT

### I. Dismissal Is Appropriate as an Exercise of International Comity

A. After evaluating the adequacy of the CIVS program for addressing plaintiffs' claims, the district court dismissed plaintiffs' suit for failure to exhaust remedies in France. App'x A5-A24. Relying on this Court's *Fischer* and *Abelesz* decisions, the district court held that exhaustion of local remedies is required by customary international law. App'x A4-A5. In the view of the United States, the court's reliance on customary international law was misplaced, but the result it reached was correct as a matter of international comity.

In *Fischer* and *Abelesz*, this Court adopted what it described as a "prudential" exhaustion requirement. *Fischer v. Magyar Államvasutak ZRT.*, 777 F.3d 847, 859 (7th Cir. 2015), *id.* n.2; *see id.* at 859 (explaining that exhaustion is not required when plaintiffs have identified "a legally compelling reason to excuse" the requirement);

*Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679-84 (7th Cir. 2012) (same). The Court based that requirement on a “well-established rule” of international law. *Fischer*, 777 F.3d at 859. The rule referenced by the Court comes from customary international-law principles applicable to the practice of diplomatic protection. *See generally Abelesz*, 692 F.3d at 679-82; *Fischer*, 777 F.3d at 854-55, 857-59. If one state causes an injury to a national of another state, the second state may espouse its national’s claim and present it to the first state for diplomatic resolution, or resolution in an international tribunal. *See Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984); Restatement (Third) of the Foreign Relations Law of the United States, §§ 712, 713 (Am. Law Inst. 1987) (Restatement). But before a state may properly seek resolution of such a claim, its national must first have exhausted the domestic remedies of the state causing the injury. Restatement § 713 cmt. f. Relying on a footnote in the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, *Fischer* observed that “there is no reason to think that this well-established [exhaustion] rule is limited to foreign sovereigns.” 777 F.3d at 859 (emphasis omitted) (citing 542 U.S. 692, 733 n.21 (2004)); *see Sosa*, 542 U.S. at 733 n.21 (noting the argument that a claimant must exhaust domestic remedies before asserting claims against a sovereign in a foreign court).

The customary international law of diplomatic protection is not an appropriate basis for a prudential-exhaustion requirement, however. Under diplomatic-protection principles, exhaustion of local remedies is mandatory, not prudential. *See, e.g.,*

*Interhandel* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 26–27 (Mar. 21)

(“Before resort may be had to an international court in [a diplomatic protection case], 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.”); *cf. Fischer*, 777 F.3d at 859 (recognizing exhaustion requirement as “prudential”); *Abelesz*, 692 F.3d at 679 (noting that exhaustion may be excused for “legally compelling” reasons).

Moreover, customary international law governing state-to-state relations rests on different considerations and may impose different obligations than customary international law addressing the relations between states and individuals. And, as this Court recognized, the Supreme Court has not “definitively” answered the question whether customary international law requires individuals to exhaust domestic remedies before bringing suit against a sovereign in a foreign court for violations of international law. *Abelesz*, 692 F.3d at 679; *see Sosa*, 542 U.S. at 733 n.21 (“We would certainly consider this requirement in an appropriate case.”). To determine whether the exhaustion requirement applies to claims by individuals against one state in the courts of another requires a deeper investigation into customary international-law exhaustion principles, which this Court did not undertake. Accordingly, this Court’s observation that “there is no reason to think that” the exhaustion requirement applicable to diplomatic protection “is limited to foreign sovereigns” (*Fischer*, 777 F.3d at 859) (emphasis omitted), is not well-supported.

*Fischer* and *Abelesz* also recognize, however, that international comity supports dismissal of international-law claims in deference to an available alternative foreign forum. For example, the Court explained that “international comity requires that [local] courts be given the first opportunity to hear the claims.” *Fischer*, 777 F.3d at 860; *see also id.* at 854 (“This exhaustion principle [is] based on comity.”), 858-59 (same); *Abelesz*, 692 F.3d at 684 (“The requirement of domestic exhaustion is not based on the relative convenience of two nations’ courts. It is based on the power of U.S. courts to hear a claim and the comity between sovereign nations that lies close to the heart of most international law.”); *Abelesz*, 692 F.3d at 682 (same). In the view of the United States, international comity is the proper basis for the prudential-exhaustion requirement that this Court described.

Whether to dismiss a claim on the basis of international comity requires an evaluation of factors this Court did not expressly consider in *Fischer* or *Abelesz*. As we explain below, international comity supports the district court’s dismissal of plaintiffs’ claims for failure to exhaust administrative remedies in France. The Court should use this case as an opportunity to clarify that the prudential-exhaustion requirement—a discretionary abstention doctrine in which a court declines to exercise jurisdiction in deference to an alternative forum—is based on international comity, rather than customary international-law principles applicable to diplomatic protection. *See* 7th Cir. R. 40(e).

B. At a general level, international comity “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.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). At issue here is the application of “adjudicatory comity” or the “comity of the courts,” which “may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.” *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014).<sup>5</sup> The doctrine is well established in United States law. *See Hilton*, 159 U.S. at 164 (distinguishing between the “comity of the courts” and the “comity of the nation”). Courts apply the doctrine in considering whether to defer not only to foreign court proceedings, but also to claims resolution by foreign non-judicial fora. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1230-32, 1237-40 (11th Cir. 2004) (dismissing claims on international comity grounds in favor of resolution by private foundation established by Germany to hear claims of victims of the Nazi regime).

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<sup>5</sup> A second type of international comity, “prescriptive comity” (also known as the comity of nations), informs courts’ interpretation of statutes to avoid unreasonable regulation of “a person or activity having connections with another State.” *F. Hoffmann-La Roche Ltd. v. Epagran S.A.*, 542 U.S. 155, 164 (2004). This case concerns adjudicatory comity.

Most courts, including this Court, have not identified specific factors to be considered in deciding whether to dismiss a suit based on international comity in favor of resolution of the claims in a foreign state's forum. But the Ninth and Eleventh Circuits have identified as central to the inquiry: (1) the United States' interests, including its foreign policy interests; (2) the foreign state's interests, including its interest in addressing matters arising within its territory; and (3) the adequacy of the foreign forum. *See, e.g., Cooper v. Tokyo Electric Power Co.*, 860 F.3d 1193, 1205 (9th Cir. 2017); *Ungaro-Benages*, 379 F.3d at 1238-39; *see also In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996) ("Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.") (prescriptive comity). That formulation is an accurate distillation of the various factors courts of appeals have considered. *See Mujica*, 771 F.3d at 603-09 (collecting cases); *Ungaro-Benages*, 379 F.3d at 1238 (same).

If the United States' and the foreign state's interests support claims resolution in the foreign forum, and if the foreign state provides an adequate alternative forum, then a court may dismiss a plaintiff's claims for failure to exhaust local remedies.<sup>6</sup>

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<sup>6</sup> A plaintiff who does exhaust local remedies will not necessarily then be able to obtain de novo consideration of those claims in a U.S. court. In that event, a court would consider whether international-comity principles support deferring to the foreign forum's decision. *See Ungaro-Benages*, 379 F.3d at 1238 (discussing factors relevant to retrospective application of international comity). Declining to defer to

C. There is little question that the first two factors, concerning the United States' and foreign sovereign's respective interests, support dismissal of plaintiffs' claims in favor of resolution in France. Plaintiffs allege that the takings occurred in France. App'x A1-A2. Two of the three plaintiffs are French nationals. Dkt. No. 1, ¶¶ 17, 18. France has a significant interest in resolving Holocaust-related claims through the procedures it has established, and it has demonstrated a willingness to do so. A21 (2014 Exec. Agm't, Pmbl.) (noting the French Republic's continuing "commit[ment] to providing compensation for the wrongs suffered by Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs"). And the United States has a longstanding policy supporting the resolution of such claims through reparation mechanisms established by the foreign states in which the claims arose, as reflected in the 2014 Executive Agreement. *See, e.g.*, A22 (2014 Exec. Agm't, Pmbl.) (noting the parties' shared resolve to address compensation claims of Holocaust victims and their families in "an amicable, extra-judicial and non-contentious manner"); *see generally Mujica*, 771 F.3d at 604-07 (discussing similar considerations).

There is also little question that the CIVS program provides an adequate alternative to adjudication of plaintiffs' claims in a U.S. court, as the district court

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the foreign decision might be appropriate, for example, if the foreign proceedings were inconsistent with U.S. public policy. *See id.*

concluded. “An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly.” *Fischer*, 777 F.3d at 867 (quotation marks omitted) (*forum non conveniens* context); see *Cooper*, 860 F.3d at 1210 (“The analysis used in evaluating the adequacy of an alternative forum is the same under the doctrine of *forum non conveniens* as it is under the doctrine of international comity.”). CIVS procedures are informal and so do not require expert advocates, though claimants may be represented by counsel. App’x A8. CIVS personnel assist claimants by performing research on their behalf in specialized archives. App’x A7. CIVS employs relaxed evidentiary standards, and can recommend compensation even in the absence of evidence, and it can rely on good-faith estimates of value. App’x A7, A12. Hearings are sometimes held outside of France to facilitate claimants’ participation. App’x A8. Favorable decisions result in compensation. *Id.* And even “if there is no evidence of the type or amount of property confiscated[,] \* \* \* the Commission recommends a lump sum payment of 930 euros in compensation.” App’x A12. If claimants are unsatisfied with the award, they may seek review from the French courts. App’x A8. Under these procedures, plaintiffs “will not be deprived of all remedies or treated unfairly.” *Fischer*, 777 F.3d at 867.

This Court may “affirm on any ground supported by the record so long as the issue was raised and the non-moving party had a fair opportunity to contest the issue in the district court.” *Locke v. Haessig*, 788 F.3d 662, 666 (7th Cir. 2015). It would be appropriate for the Court to affirm the district court’s judgment on the basis of



international comity. The district court acted well within its discretion in determining that CIVS provides an adequate alternative forum, and in concluding that the interests of the United States and France support consideration of plaintiffs' claims by CIVS. *See Fischer*, 777 F.3d at 866 (abuse of discretion standard applies to district court's determination of adequacy of foreign forum and *forum non conveniens* factors). But even under de novo review, it is apparent that the international comity factors support dismissal of plaintiffs' claims in favor of resolution in France.<sup>7</sup>

D. Plaintiffs do not dispute that the sovereign interests favor resolution of their claims by CIVS. Instead, their opening appellate brief is devoted to the argument that CIVS is not an adequate forum, because it lacks jurisdiction to consider claims of spoliation by SNCF (Br. 16-22) and, in any event, because CIVS procedures do not provide an effective remedy for the claims CIVS considers (Br. 22-30). Those arguments lack merit. The district court did not abuse its discretion in finding CIVS to be an adequate forum.

Plaintiffs identify no French law that clearly excludes SNCF spoliation claims from CIVS's jurisdiction. In the absence of any such limitation, plaintiffs have given

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<sup>7</sup> The district court formally dismissed plaintiffs' suit "for lack of subject-matter jurisdiction." App'x. A24. That characterization of the dismissal was in error: As explained above, the exhaustion requirement is a non-jurisdictional, "prudential" requirement. *See Fischer*, 777 F.3d at 859; *see id.* at 854 ("[N]othing in the language of the FSIA expropriation exception suggests that plaintiffs must exhaust domestic remedies before resorting to United States courts.").

no reason to doubt the CIVS Chairman's sworn declaration that CIVS is competent to consider plaintiffs' claims and will do so if plaintiffs submit them. *See* App'x A17 (discussing declaration).

Plaintiffs' arguments concerning the effectiveness of CIVS's procedures are no stronger. They rely, as the district court noted (App'x A23), on anecdotal reports about perceived shortcomings, rather than on any inherent deficiencies in the program. Plaintiffs further rely (Br. 25-28) on a critical report by a French parliamentarian (which they erroneously attribute to the French Senate). But none of this is sufficient to suggest that the district court abused its discretion or otherwise erred in concluding that CIVS is an adequate forum (App'x A18-A22), especially given the endorsement of the United States (and, in addition, the endorsement of CRIF, the largest French Jewish umbrella organization, representing over sixty Jewish organizations in France). *See supra* n.4.

Plaintiffs also argue that a recent decision of the D.C. Circuit demonstrates that exhaustion is not a condition for the exercise of jurisdiction under the FSIA's expropriation exception. Br. 13-15 (discussing *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 415-16 (D.C. Cir. 2018)). As an initial matter, the district court did not hold that the FSIA requires exhaustion. App'x A5 ("[T]he FSIA does not itself impose a statutory exhaustion requirement."). *Philipp* held that Congress's regulation of suits against foreign states through the enactment of the FSIA abrogated case-by-case application of foreign sovereign-specific, common-law doctrines such as

international comity. 894 F.3d at 413-15. On that basis, the D.C. Circuit disagreed with this Court's application of the exhaustion requirement to claims under the expropriation exception. *Id.* at 416 ("[The FSIA] leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity."). A D.C. Circuit decision does not, of course, overrule Seventh Circuit precedent.

In any event, as the United States has explained in an amicus brief supporting rehearing en banc in *Philipp*, the D.C. Circuit's holding is based on a mistaken inference. *See* Brief for the United States as Amicus Curiae in Support of Rehearing En Banc, *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 2018 WL 4385105 (D.C. Cir. Sept. 14, 2018) (No. 17-7064). Congress comprehensively codified the principles governing foreign state immunity and district court jurisdiction over suits against foreign states. But nothing in the text or history of the FSIA suggests that Congress intended to abrogate prudential doctrines unrelated to jurisdiction. *See, e.g.*, H.R. Rep. No. 94-1487, at 20 (1976) ("Since, however, [the expropriation exception] deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable."). Indeed, *Philipp* itself acknowledges (894 F.3d at 416) the continuing applicability of the *forum non conveniens* doctrine, which requires consideration of factors that overlap extensively with those relevant to international comity.

*Philipp* relied on the Supreme Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), in holding that the FSIA supplants common-law

doctrines like international comity. 894 F.3d at 415. But *NML Capital* 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” than when the debtor is a private party. 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 on the Act’s text. Or it must fall.” *Id.* at 2256; *see id.* (holding that the FSIA does not limit post-judgment discovery). *NML Capital* thus focused solely on whether courts may rely on extra-statutory doctrines in resolving disputes concerning a foreign state’s immunity. To the limited extent it addressed whether courts may rely on common-law doctrines such as international comity to address matters not bearing on immunity, it recognized that such reliance is appropriate. *See id.* 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.).

The Supreme Court’s recognition that courts may properly apply international-comity principles in suits under the FSIA is not surprising. A district court’s decision to abstain from exercising FSIA jurisdiction on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts under other jurisdictional statutes. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing abstention doctrines under which U.S. courts decline to exercise jurisdiction in deference to U.S. State proceedings). Like international comity, domestic abstention doctrines are rooted in “deference to the paramount interests of

another sovereign.” *Id.* And like the FSIA, other statutes granting jurisdiction are enacted against “the common-law background” in which courts exercised equitable discretion to decline to adjudicate certain classes of cases. *Id.* at 717. There is no reason to think that, in enacting the FSIA, Congress intended to divest the courts of their historic power to dismiss suits on international comity grounds. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that, in the absence of an evident “statutory purpose to the contrary,” Congress legislates with an expectation that courts will apply well-established common-law principles).

## **II. Dismissal Also Is Appropriate Under the *Forum Non Conveniens* Doctrine**

In the alternative, this Court may affirm the district court’s dismissal of plaintiffs’ claims under the *forum non conveniens* doctrine. *See Locke*, 788 F.3d at 666 (court of appeals may affirm on any basis supported by the record). “[T]he focus [of the inquiry] is the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.” *Fischer*, 777 F.3d at 866 (quotation marks omitted). The analysis begins with a presumption in favor of the plaintiffs’ choice of forum. *Id.* at 871. That presumption is rebuttable if the alternative forum is adequate (*id.* at 867), and if private and public interests support resolution of the claims in the alternative forum (*id.* at 867). *See id.* at 871. Private interests include such things as the relative ease of access to sources of proof; the availability of effective administrative procedures for presenting evidence to the

adjudicator; and ease of enforcement. *Id.* at 868. Public interests include the interest in having local disputes decided locally; application of local law by a local forum; and avoidance of problems stemming from conflicts of law or application of foreign law. *Id.*

For the reasons provided above, and as the district court determined, CIVS provides an adequate forum for resolution of plaintiffs' claims. The private and public interest factors also support dismissal.

The only consideration that supports adjudication of plaintiffs' suit in the district court is the preference given to a plaintiff's chosen forum. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). "When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable." *Id.* (quotation marks omitted). In this case, two of the three plaintiffs are French citizens who reside in France, lessening the preference given to plaintiffs' chosen forum. *See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) ("[T]he degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on the degree of convenience reflected by the choice in a given case.") (quotation marks omitted).

Moreover, the private- and public-interest factors rebut any preference that would otherwise be given to plaintiffs' choice of forum. *See Fischer*, 777 F.3d at 871. With respect to the private interests: sources of proof are in France; CIVS provides

assistance in searching for relevant evidence; and awards, when granted, are made without the need for compulsory process. Similarly, the relevant public interest factors support resolution by CIVS. France has a significant and longstanding interest in providing compensation, using its own procedures, for the Nazi atrocities committed in its territory. And a judgment in plaintiffs' favor would conflict with the United States' longstanding policy favoring resolution of Holocaust-related claims through remedies, including administrative remedies, provided by the foreign state, rather than litigation in U.S. courts.

### **III. Plaintiffs Failed to Allege Facts Supporting Jurisdiction Under the Expropriation Exception**

Finally, this Court may affirm the judgment because the district court lacked jurisdiction over plaintiffs' suit. As this Court has explained, the FSIA's expropriation exception applies "only where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied." *Fischer*, 777 F.3d at 854. Plaintiffs' complaint fails adequately to plead a factual claim necessary for the second element: that SNCF took the property of plaintiffs' relatives.

"[W]hen evaluating a facial challenge to subject matter jurisdiction," a court evaluates the factual allegations in the complaint under the "plausibility" standard governing motions to dismiss for failure to state a claim. *Silba v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015); *see id.* at 173 ("[A] facial challenge argues that the plaintiff has

not sufficiently alleged a basis of subject matter jurisdiction.”) (quotation marks and emphasis omitted). “[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Id.* (quotation marks and citation omitted; alteration in original). As applied to a facial challenge to subject-matter jurisdiction, the question is whether the complaint’s “factual allegations plausibly suggest a claim of subject matter jurisdiction.” *Silba*, 807 F.3d at 174.

Scalin, like the other two plaintiffs, alleges that she “believes that her grandparents, like all the victims, had Property with them and that Property was taken.” Dkt. No. 1, ¶ 16 (Compl.). Plaintiffs’ conclusory statements are the sort of “naked assertion[s] devoid of further factual enhancement,” and a “formulaic recitation of [an] element[]” of the expropriation exception, *Iqbal*, 556 U.S. at 678 (first alteration in original), that is insufficient to satisfy the plausibility standard.



Plaintiffs therefore failed to adequately allege facts that would support jurisdiction under the expropriation exception.<sup>8</sup>

### CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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<sup>8</sup> Even if a plaintiff makes plausible jurisdictional allegations, before the suit may proceed to the merits, the plaintiff is required to establish any contested factual allegation bearing on the foreign state's immunity. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316-17 (2017) ("Where jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes. But, consistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from suit, the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible."). Here, because plaintiffs failed even to adequately allege a jurisdictional fact, the district court had no need to resolve any factual dispute relating to SNCF's immunity.

## ADDENDUM

Decl. of Stuart E. Eizenstat, Deputy Secretary of the Treasury and Special Representative to the President and Secretary of State on Holocaust Issues (Jan. 19, 2001), Dkt. No. 63, Ex. A, <i>Scalin v. Société Nationale des Chemins de Fer Français</i> , 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018) (No. 15-3362) .....	A1
Agreement Between the United States of America and France, Dec. 8, 2014, T.I.A.S. No. 15-1101, Dkt. No. 63, Ex. B, <i>Scalin v. Société Nationale des Chemins de Fer Français</i> , 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018) (No. 15-3362) .....	A20

DECLARATION OF STUART E. EIZENSTAT

I, Stuart E. Eizenstat, hereby declare and state as follows:

1. I am currently the Deputy Secretary of the Treasury, as well as the Special Representative of the President and the Secretary of State on Holocaust Issues, positions I have held since July 1999. Prior to my current position, I served as Under Secretary of State for Economic Affairs, and before that as Under Secretary of Commerce and as U.S. Ambassador to the European Union. Since 1995, I have been the Secretary of State's Special Envoy on Property Restitution in Central and Eastern Europe.

2. A number of lawsuits have been filed against French and other banks that operated in France during World War II on behalf of Holocaust survivors, other victims of the Nazi era, and their heirs to recover, among other things, looted property and assets deposited in dormant or confiscated bank accounts in France.

3. As a matter of policy, the United States Government 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, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. This is because the U.S. supports efforts to bring some measure of justice to these victims in their lifetimes, and because the U.S. believes that available funds

should be spent on the victims and not on litigation, and, importantly, also because the number of victims who can be covered by a negotiated settlement is often greater than can be achieved through litigation. Much of my work over the past five years has been devoted to effectuating this policy.

4. Most recently, and most relevant to this litigation, I led an inter-agency United States Government team in negotiations resulting in the creation of a fund, and improvements to a French governmental commission, each of which will make payments to victims of French banks during World War II. This declaration sets forth the history of those negotiations, information about France's efforts in creating the commission and a related foundation, and the basis upon which the United States Government has concluded that it would be in its foreign policy interest for that fund, commission, and foundation to be the exclusive remedies and fora for all claims against French banks arising out of their activities in France during World War II, including those raised in this litigation.

#### **Background of French Banks Negotiations**

5. The background of these negotiations encompasses three sets of simultaneous developments: the activities of the government of France, the activities of attorneys representing claimants against French banks, and the activities of the United

States Government.

6. In 1995, President Jacques Chirac of France publicly recognized France's unremitting debt to the victims of the German occupation and the Vichy Regime in France, and pledged that the French Government would take efforts to address all remaining vestiges of that period. One of those efforts was the creation, in January 1997, of the Study Mission on the Spoliation of Jews in France, known as the "Mattéoli Mission," the aim of which was to study the conditions under which property belonging to French Jews was confiscated by the Nazis and Vichy authorities during the period 1940-1944. In April 2000, the Mattéoli Mission issued a 3,000 page report detailing various types of property spoliation that occurred and attempting to quantify the extent of such spoliation. With respect to banking assets, the Mattéoli Mission found that approximately 64,000 people, holding approximately 80,000 bank accounts, were deprived, either temporarily or permanently, of over seven billion francs in assets. While it was able to determine that some of that amount was restituted, the fate of significant portions of the spoliated bank assets remains unknown.

7. The Mattéoli Mission made several recommendations for addressing these deprivations, two of which are particularly relevant here. First, it recommended creation of a commission to

hear claims by individuals who lost property or are heirs to those who lost property that was never restituted. That commission, the Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation ("Drai Commission"), was created in September, 1999. Second, it recommended the creation of a foundation to support Holocaust education and memory and to provide financial support to victims of persecution and their families. That foundation, the Foundation for Memory of the Shoah ("Foundation"), was created in December 2000. An orphan's fund was also created for the children of those killed during the Holocaust.

8. Meanwhile, in December 1997 and again in December 1998, attorneys representing individuals with World War II era claims against French and other banks filed class action law suits in the United States against those banks to, among other things, recover unrestituted assets belonging to them or their antecedents. Those cases proceeded to the point where, on August 31, 2000, a United States District Court denied a motion to dismiss two of the cases, indicating that they would be allowed to proceed.

9. Finally, and also simultaneously, from the Fall of 1998 through the Summer of 2000, I led an inter-agency United States

Government team that facilitated a resolution of class action lawsuits filed in U.S. courts against German companies arising from slave and forced labor and other wrongs by those companies during the Nazi era. Those negotiations resulted, in July 2000, in the creation of a German Foundation, "Remembrance, Responsibility, and the Future," to make payments to victims of slave and forced labor and all others who suffered at the hands of German companies during the Nazi era.

10. While the German negotiations were proceeding, I also led an inter-agency United States Government team facilitating similar talks revolving around the role of the Republic of Austria and Austrian companies in the Nazi era and World War II. In October, 2000, those talks resulted in the creation of a foundation in Austria to make payments to those who worked as slave and forced laborers on the present day territory of the Republic of Austria.

11. Subsequent to the conclusion of the German negotiations, I was approached separately by the French Government and by attorneys representing individuals with claims against French banks arising out of the Holocaust. Each of them sought U.S. Government assistance in facilitating a resolution of the pending class action litigation against French and other banks, following the models established in the German and

Austrian negotiations.

### **The Negotiations and Resolution**

12. These negotiations commenced in November, 2000, with a set of meetings in Washington, D.C. Subsequent meetings were held in December in Washington, in January in Paris, France, and most recently, on January 17-18 in Washington. The participants have included the government of France, attorneys representing French banks, attorneys representing claimants against the banks, the Simon Wiesenthal Center of Paris, and the Conseil Représentatif des Institutions Juives de France ("CRIF"), an umbrella organization of French Jewish groups. Through these participants, the victims' interests and those of the banks were broadly and vigorously represented.

13. The negotiations centered on the question of whether the existing institutions created by the French - the Drai Commission and Foundation - could sufficiently ensure fair compensation for those who suffered losses at the hands of French and other banks during the Holocaust. At the outset, the parties were far apart on both this question, and on the amount of money necessary to provide such compensation.

14. One of the key issues for the attorneys representing the victims was to establish a mechanism for compensation to those people who, despite the impressive and exhaustive



historical work of the Mattéoli Mission, could not point to specific evidence of the existence and fate of their or their families' banking assets. Although the Drai Commission would make compensation awards to claimants on very relaxed standards of proof, there could be no guarantee that all victims would receive some measure of justice.

15. At a negotiating session that lasted well into the night of January 8-9, 2001, the parties reached a major breakthrough. The French banks agreed to create a supplemental fund (the "Fund"), which would make payments to people with little or no documentation of their claims, in addition to maintaining its commitment to pay all well-documented claims through the workings of the Drai Commission. In return, the plaintiffs, through their attorneys, agreed that they would voluntarily dismiss with prejudice all lawsuits currently pending against French banks. In a lengthy negotiating session all night on January 17 and during the day on January 18, we hammered out an agreement satisfactory to all parties.

16. On January 18, 2001, the parties to the negotiations gathered in Washington to sign a Joint Statement concluding the negotiations, and expressing their support for the Fund, the Drai Commission, and the Foundation. See Exh. A. Secretary of State Albright personally congratulated the parties on the successful

conclusion of the negotiations. On the same day, the United States and France signed an Executive Agreement, in which France committed that the operation of the Fund, the Draï Commission, and the Foundation would be governed by principles agreed by the parties to the negotiations, and the United States committed to take certain steps to assist French banks<sup>1</sup> in achieving "legal peace" in the United States for claims arising out of their activities in France during World War II. See Exh. B.

17. The role played by the United States in this negotiation was as a facilitator. The Executive Agreement negotiated is not a government-to-government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else. Instead, the intent of our participation was to bring together the victims' constituencies on one side and the French Government and banks on the other, to bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace. Among these parties, the United States facilitated the essential arrangement by which the French side would establish the Fund, and make

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<sup>1</sup> The term "French banks" includes several non-French banks as well - in the agreements of the parties, the word "Banks" is defined to include all banks that are defendants in the litigation over World War II era activities, as well as all banks that are members of a French bank trade association.

certain enhancements to the Drai Commission and Foundation, to compensate those who suffered at the hands of banks operating in France during World War II, and the class action representatives in pending United States litigation agreed to give up their claims. The United States further contributed its own commitment to advise U.S. courts of its foreign policy interests, described in detail below, in the Fund, the Drai Commission, and the Foundation being treated as the exclusive remedies for Holocaust-related claims against French banks, and, concomitantly, in current and future litigation being dismissed.

#### **The French Institutions**

18. Taken together, the Fund, the Drai Commission, and the Foundation are intended to accomplish a complete disgorgement of any unjust enrichment and assets never restituted to their rightful owners by the French government, banks, and other financial institutions, and will result in compensation to persons who suffered at the hands of French banks during World War II.

19. The Drai Commission will operate as follows. It will undertake a program to publicize world-wide its existence and the availability of its claims procedure and to make its forms and application procedures easily available to claimants at no cost to them. It will also cooperate with organizations representing

victims to ensure that potential claimants have knowledge of and access to the Commission. In addition, it will set up offices or contact centers in the United States, in Israel, and in any other countries in which a significant number of potential claimants live, to allow claimants to contact the Commission and make their claims without travel to France.

20. The Drai Commission will investigate and consider all claims by any person for compensation for any bank or financial institution doing business in France during World War II and, if an account can be verified, determine the amount designed to compensate fully the claimants for any material damages. It will do so based on relaxed standards of proof. It can recognize as sufficient to authorize payment any of various standards of evidence, including not only proof but also presumptions, indications, and even the "intimate conviction" of the Commission. Claimants can be represented by counsel or others at every stage of the process, even if they cannot personally appear.

21. Once the Commission determines an award should be made, it will refer that award to the French banks. There is no monetary limit on such awards. The banks have committed, in writing, to make full and prompt payment of all awards recommended by the Commission, at current value, regardless of

the eventual total amount. As good faith evidence of that commitment, the banks agreed during our negotiations to establish an escrow account, initially capitalized at \$50 million and to be replenished so as to ensure the amount in the account never falls below \$25 million, to be used to promptly pay all Draï Commission awards.

22. The Commission has agreed to establish an appeals process. Claimants whose claims are decided by a panel of Commission members are entitled to appeal to the full Commission, while those whose claims are decided in the first instance by the full Commission will be entitled to seek reconsideration of such decisions, in each case on the basis of new facts, new evidence, or material error. These internal appeals are in addition to whatever administrative and judicial appeals may exist under French law.

23. The Commission will also issue regular public reports that detail its activity as well as the criteria established through Commission decisions and the procedures for processing claims. It will also provide a confidential report on the case-by-case disposition of banking claims. That report will be shared with the United States Government. The Draï Commission will also welcome representatives of Holocaust victims and the United States Government for exchanges of information, and it

will operate with the maximum transparency provided for under French law.

24. Individuals whose claims cannot be substantiated by the Drai Commission, and whose names cannot be matched to the list of 64,000 account holders prepared by the Mattéoli Mission, but who submit credible evidence that suggests they or their antecedents may have had bank assets that were not subject to restitution, will be referred by the Drai Commission to the Fund. The Fund, capitalized at \$22.5 million contributed by the French banks, will make per capita payments of up to \$3,000 to all persons referred to it by the Drai Commission. The Fund is also permitted to make supplemental payments to individuals who receive awards from the Drai Commission that are lower than the Fund's per capita payment floor. Interest on the Fund will be used for administrative expenses, and for the costs of an organization selected by plaintiffs' counsel to help facilitate claims, and will accrue to the benefit of the Fund. Any unused portion of the Fund at the end of the claims period will be contributed to the Foundation.

25. The Foundation serves as the primary mechanism to achieve full disgorgement by French banks and other French institutions of any remaining assets that were not subject to restitution. The endowment of the Foundation, which is over 2.5

billion Francs, or approximately \$375 million at current exchange rates, was set at the amount recommended by the Mattéoli Mission, and represents the current value of the amount of assets that cannot be conclusively shown to have been reactivated by the rightful owners. Approximately \$100 million of that was contributed by French banks.

26. The Foundation will have among its objectives the development of research and dissemination of knowledge about the Holocaust and the victims of the Holocaust, as well as other genocides and crimes against humanity, and support for initiatives to give moral, technical, and financial support to those who have suffered from persecution and their families. A significant amount of the Foundation's funds will be used for grants to organizations outside France, including in the United States.

27. The Foundation will be run by a 25 member Board of Directors, chaired by a Holocaust survivor, Simone Weil. Eight directors will represent the French government, ten will represent Jewish groups in France, including the CRIF, and seven will be eminent persons chosen by the other directors and can include non-French nationals.

28. A key point regarding these institutions is that all victims who suffered injury at the hands of French banks are

eligible to apply for restitution. Indeed, during the negotiations, attorneys representing the victims vigorously represented not only the named plaintiffs in their cases, but also the interests of heirs and others who are similarly situated.

#### **The United States' Interests**

29. The creation and successful operation of the Fund, the Draï Commission, and the Foundation is in the enduring and high interests of the United States. The United States Government believes, for the reasons set forth below, that all claims against French banks arising from their activities in France during World War II, including but not limited to claims relating to aryanization and damage to or loss of property, including banking assets, should be pursued through the Draï Commission and the Foundation instead of the courts.

30. First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes. Over one hundred thousand Holocaust survivors, including many who emigrated from France, live in the United States. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation.



31. The Drai Commission, the Fund, and the Foundation are an excellent example of how such cooperation can lead to a positive result. These fora will, without question, provide benefits to more victims, and will do so faster and with less uncertainty than would litigation, with its attendant delays, uncertainty, and legal hurdles. Moreover, the Drai Commission and the Fund will employ standards of proof that are far more relaxed than would be the case with litigation. Litigation, even if successful, could only benefit those able to make out a claim against a bank over which they could obtain jurisdiction in the United States. By contrast, the Drai Commission, the Fund, and the Foundation will benefit all those with claims against banks that were active in France during World War II, regardless of whether such banks are still in existence today. The creation of the Fund by the banks, the commitment by the French banks to pay all awards recommended by the Commission, and the participation in the Foundation not only by the French banks but by the Government of France and other financial institutions, allow comprehensive relief for a broader class of victims than would be possible in United States judicial proceedings.

32. All participants in the negotiations accepted the level of the Foundation's funding, which was intended to accomplish full disgorgement of any assets never restituted to their

rightful owners, the level of funding of the Fund, and the procedures adopted by the Drai Commission for prompt resolution of all claims brought before it. In addition, the Foundation will be dedicated in part to efforts to ensure that crimes like those perpetrated during the Holocaust never happen again.

33. The United States, together with the participating lawyers for the victims and all other parties to the negotiations, therefore believes that the resolution of these cases through the Drai Commission, the Fund, and the Foundation is fair under all the circumstances. This resolution, like the previous resolutions in Germany and Austria, the United States hopes, will serve as an example to other nations and in other cases where resolution of claims by victims of the Nazi era for restitution and compensation has not yet been achieved.

34. Second, establishment of the Fund, and recognition of the Drai Commission and the Foundation, helps further the close cooperation between the United States and its important European ally and economic partner, France. One of the reasons the United States took an active role in facilitating a resolution of the issues raised in this litigation is that we were asked by the French Government to work as partners with them in helping to make their efforts a success. In recent years, French-American cooperation on these and other issues has been very close,

culminating in the joint effort to resolve these complex issues. This has helped solidify the ties between our two countries, ties which are central to U.S. interests in Europe and the world.

35. France is the oldest ally of the United States, and a major political partner on the international scene. As a member of the United Nations Security Council, NATO, the European Union, the Organization on Security and Cooperation in Europe, and the Council of Europe, France plays a critical role on issues that directly affect U.S. national interests. France has collaborated closely with the United States in critical areas such as the Middle East peace process, the Balkans, and reform of the United Nations. France is a major component of the European Union, with which the U.S. has trading relations amounting to more than a trillion dollars a year. We work closely with our French allies over a broad agenda -- political, economic and social -- and need their cooperation in achieving many of our goals, including with respect to Holocaust assets. Given the many challenges the U.S. will face in the future and the importance of the relationship with France, it is essential that we work to diminish any potential irritants between the two countries.

36. Third, the participating plaintiffs' counsel, the defendants, victims' representatives, and the French government are united in seeking dismissal of this litigation in favor of

the remedy provided by the Fund, the Drai Commission, and the Foundation, and the United States strongly supports this position. The alternative would be years of litigation whose outcome would be uncertain at best, and which would last beyond the expected life span of the large majority of survivors. Ongoing litigation could lead to conflict among survivors' organizations and between survivors and French banks, conflicts into which the United States and French governments would inevitably be drawn. There would likely be threats of political action, boycotts, and legal steps against corporations from France, setting back European-American economic cooperation.

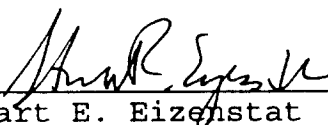
37. Dismissal of all pending litigation in the United States in which Holocaust-related claims are asserted against French banks was accepted by all as a precondition to allowing the Fund to make payments to victims. The United States strongly supports the creation of the Fund, and wants its benefits to reach victims as soon as possible. Therefore, in the context of the Fund, it is in the enduring and high interest of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e., "legal peace" for) all Holocaust-related claims against French banks.

38. Fourth, and finally, the Fund, the Drai Commission, and the Foundation are a fulfillment of a half-century effort to

complete the task of bringing justice to victims of the Nazi era. Since the liberation of France in 1944, France has made compensation and reconciliation for wrongs committed during the occupation and Vichy regime an important part of its political agenda. Although no amount of money will ever be enough to make up for all Nazi-era crimes, the French Government has over time created significant compensation and restitution programs for Nazi-era acts. The Fund and the Foundation add another \$400 million to that total, over and above whatever claims are ultimately paid through the Draï Commission, and complement these prior programs.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 1/19/01

  
Stuart E. Eizenstat  
Deputy Secretary of the Treasury  
and Special Representative of the  
President and Secretary of  
State on Holocaust Issues

Agreement  
between  
the Government of the United States of America  
and  
the Government of the French Republic  
on  
Compensation for Certain Victims  
of Holocaust-Related Deportation from France  
Who Are not Covered by French Programs

The Government of the United States of America,

And

The Government of the French Republic,

Hereinafter referred to jointly as “the Parties,”

Wishing to further develop the relations between their two countries in a spirit of friendship and cooperation and to resolve certain difficulties from the past,

Recognizing and condemning the horrors of the Holocaust, including the tragic deportation of Jewish individuals from France during the Second World War,

Noting that since 1946 the Government of the French Republic has implemented extensive measures to restore the property of and to provide compensation for victims of anti-Semitic persecution carried out during the Second World War by the German Occupation authorities or the Vichy Government, including a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans,

Noting that the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs,

Recalling that on July 16, 1995 the President of the French Republic solemnly recognized the State’s responsibility in the process of deportation of those victims and an imprescriptible debt towards them,

Recognizing that some Holocaust victims deported from France, their surviving spouses and their assigns, were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic in this area,

Having held discussions in a spirit of friendship and cooperation with the shared aim of resolving through dialogue issues relating to the non-coverage of such persons,

Resolved by common consent and by way of an amicable, extra-judicial and non-contentious manner to address the issue of compensation for such persons,

Believing that it is in the interest of both Parties to guarantee the foreign sovereign immunity of France for Holocaust deportation claims and to provide through this Agreement a mechanism for providing compensation for any and all claims brought by such persons,

Recognizing that France, having agreed to provide fair and equitable compensation to such persons under this Agreement, should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere,

Noting that this Agreement constitutes the exclusive and final means for addressing those claims between the United States of America and France,

Noting the Parties' intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France,

Having both consulted with various stakeholders, including representatives of Jewish communities, claimants, and members of legislative bodies regarding Holocaust deportation,

Believing that this Agreement will provide as expeditious as possible the mechanism for making fair and speedy payments to now elderly victims,

Have agreed as follows:

### **Article 1**

For purposes of this Agreement, and except as otherwise indicated by use of a specific term:

1. Reference to "France" means the French Republic, the Government of the French Republic, any current or past agency or instrumentality of the French Government (whether owned in whole or in majority by the French Republic), their successor entities under any status, and any official, employee, or agent of the French Republic acting within the scope of his or her office, employment, or agency.



2. Reference to “French nationals” means natural persons who, at the time this Agreement enters into force, are nationals of the French Republic.
3. Reference to “Holocaust deportation” means the transportation of an individual from France towards a location outside of France during the Second World War as part of the anti-Semitic persecution carried out by the German Occupation authorities or the Vichy Government.
4. Reference to “Holocaust deportation claim” means a claim for compensatory or other relief in connection with Holocaust deportation.

## **Article 2**

The objectives of this Agreement are to:

1. Provide an exclusive mechanism for compensating persons who survived deportation from France, their surviving spouses, or their assigns, who were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic to address Holocaust deportation claims;
2. Create a binding international obligation on the part of the United States of America to recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims and, consistent with its constitutional structure, to undertake all actions necessary to ensure an enduring legal peace at the federal, state, and local levels of the Government of the United States of America.

## **Article 3**

1. This Agreement shall not apply to Holocaust deportation claims of French nationals.
2. This Agreement shall not apply to Holocaust deportation claims of nationals of other countries who have received, or are eligible to receive, compensation under an international agreement concluded by the Government of the French Republic addressing Holocaust deportation.

3. This Agreement shall not apply to persons who have received, or are eligible to receive, compensation under the Government of the French Republic's compensation program instituting a reparation measure for orphans whose parents died in deportation (Decree no. 2000-657 of 13 July 2000).
4. This Agreement shall not apply to Holocaust deportation claims of persons who have received compensation under another State's program providing compensation specifically for Holocaust deportation or who have received compensation under any program of any institution providing compensation specifically for Holocaust deportation.

#### **Article 4**

1. Within thirty (30) days of the date this Agreement enters into force, the Government of the French Republic shall transfer to the Government of the United States of America a payment of U.S. \$60 million, to be used by the Government of the United States of America for making payments under this Agreement, as provided for in Article 6.
2. The Parties agree that this payment constitutes the final, comprehensive, and exclusive manner for addressing, between the United States of America and France, all Holocaust deportation claims not covered by existing compensation programs, which have been or may be asserted against France in the United States of America or in France.
3. The Parties further agree that any payment to an individual under this Agreement shall constitute the final, comprehensive, and exclusive manner for addressing all Holocaust deportation claims by that individual not covered by existing compensation programs, which have been or may be asserted against France in any forum.
4. In accordance with the applicable domestic procedures of the United States, the Government of the United States of America will deposit amounts received from the Government of the French Republic in an interest-bearing account in the United States Treasury until distribution, pursuant to a determination by the Secretary of State of the United States of America or his designee.

## Article 5

Upon payment of the sum referred to in Article 4 of this Agreement, the Government of the United States of America:

1. By this Agreement, confirms its recognition in connection with any Holocaust deportation claims of:

- (i) the sovereign immunity of France and the property of France; and

- (ii) the diplomatic, consular, or official immunity of French officials, employees, and agents and the property of each,

as such sovereign, diplomatic, consular, and official immunities are normally recognized within the United States legal system for other foreign states, their agencies, instrumentalities, officials, employees, and agents, and the property of each.

2. Shall secure, with the assistance of the Government of the French Republic if need be, at the earliest possible date, the termination of any pending suits or future suits that may be filed in any court at any level of the United States legal system against France concerning any Holocaust deportation claim.
3. Shall, in a timely manner, and consistent with its constitutional structure, undertake all actions necessary to achieve the objectives of this Agreement, which include an enduring legal peace, at the federal, state, and local levels of government in the United States of America and shall avoid any action that:
  - a. Contradicts the terms of the Agreement, and in particular challenges the sovereign immunity of France concerning any Holocaust deportation claim; or
  - b. Stands as an obstacle to the accomplishment and execution of the Agreement.
4. Shall require, before making any distribution payment to an eligible recipient under this Agreement, that the recipient execute a writing following the form of the Annex attached to this Agreement, including (i) a waiver of all of the recipient's rights to assert claims for compensatory

or other relief in any forum against France concerning Holocaust deportation or pension programs related thereto; (ii) a declaration that the recipient has not received, and will not claim, any payment under French programs or an international agreement concluded by the Government of the French Republic relating to Holocaust deportation; and (iii) a declaration that the recipient has not received any payment under any other State's compensation program or under the compensation program of any foreign institution relating specifically to Holocaust deportation.

#### **Article 6**

1. The Government of the United States of America shall distribute the sum referred to in Article 4(1) of this Agreement according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible.
2. Notwithstanding the preceding paragraph:
  - a. In developing criteria for distributing the sum referred to in Article 4(1), the United States shall consider the objectives of this Agreement set out in Article 2.
  - b. Any Holocaust deportation claim of a person within the scope of Articles 3(1), 3(2), 3(3), or 3(4) of this Agreement is not eligible for compensation under this Agreement, and the United States of America, upon determining that a claim comes within the scope of Articles 3(1), 3(2), 3(3), or 3(4), shall declare inadmissible and reject any such claim.
  - c. In determining whether a claim comes within the scope of Article 3(1), for administration of the distribution, the United States of America shall rely on the sworn statement of nationality appearing in the opening paragraph of the writing appearing as the Annex to this Agreement. In determining whether a claim comes within the scope of Article 3(2), 3(3), or 3(4), for administration of the distribution, the United States shall rely on the sworn representations numbered 5 and 6 in the writing appearing as the Annex to this Agreement, as well as on any relevant information obtained under Article 6(6) of this Agreement.

3. The Government of the United States of America or an entity designated by the Government of the United States of America shall have exclusive competence for distribution of the sum referred to in Article 4(1) of this Agreement, and the Government of the French Republic shall have no rights related to such distribution.
4. The Government of the United States of America shall take reasonable steps to provide sufficient notice about the distribution of funds under this Agreement to persons who may qualify under the criteria determined by the Government of the United States of America pursuant to Article 6(1) of this Agreement.
5. In accordance with applicable domestic procedures of the United States of America, the Government of the United States of America shall provide an appropriate period of time for persons to submit a claim for compensation under this Agreement.
6. Subject to their respective applicable laws, the Parties shall exchange information helpful to implementation of this Agreement, including information required to ensure that no claimant receives an inadmissible payment pursuant to Article 6(2)(b) of this Agreement.
7. At the request of the Government of the French Republic, the Government of the United States of America shall each year provide a report on the implementation of this Agreement which shall include, at a minimum, statistical data related to payments and categories of beneficiaries. This obligation shall expire one year following the date on which the United States completes the distribution of the sum referred to in Article 4(1) of this Agreement as provided for in Article 6(1) of this Agreement.

#### **Article 7**

The Annex attached hereto forms an integral part of this Agreement.

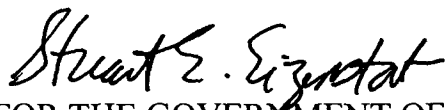
#### **Article 8**

Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties.

### Article 9

Each Party shall notify the other of completion of the national procedures required in order for this Agreement to enter into force, which shall occur on the first day of the second month following the day on which the later notification is received. The Parties recognize that, upon entry into force, this Agreement imposes binding international obligations.

Done at Washington, D.C., this 8th day of December, 2014, in duplicate, in the English and French languages, both texts being equally authentic.



FOR THE GOVERNMENT OF  
THE UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF  
THE FRENCH REPUBLIC:

## ANNEX

to the Agreement between the Government of the United States of America  
and the Government of the French Republic  
on Compensation for Certain Victims of Holocaust-Related Deportation  
from France Who Are not Covered by French Programs

**Form of Written Undertaking That Any Recipient of Compensation  
Must Execute Before Receiving Payment under this Agreement**

## FORM

I, \_\_\_\_\_, a national of  
[country] (a copy of government  
documentation establishing nationality must be attached to the present written  
undertaking), hereby agree to receive an amount equal to \_\_\_\_\_ in full  
satisfaction and final settlement of any claim coming within the terms of the  
Agreement between the Government of the French Republic and the  
Government of the United States of America on Compensation for Certain  
Victims of Holocaust-Related Deportation from France Who Are not Covered  
by French Programs ("the Agreement"), signed in [city] \_\_\_\_\_ on  
[date/month/year]. *Terms used in this written undertaking  
shall have the meaning prescribed in the Agreement.*

Upon receipt of the amount noted:

(1) I release and forever discharge France and any French national  
(including natural and juridical persons) from any liability of any kind for all  
claims relating to Holocaust deportation.

(2) I forever relinquish all claims, demands, rights of action, suits, and  
judgments, that I have ever had or will have, or which my heirs, executors,  
administrators, or assigns ever had or ever may have, relating to Holocaust  
deportation.

(3) I release and forever discharge the Government of the United States of  
America; its agencies or instrumentalities; and officials, employees, and agents  
of the Government of the United States of America or the United States'  
agencies and instrumentalities from any liability of any kind relating to  
Holocaust deportation, United States actions and policies affecting those claims,  
any associated litigation, and the United States' administration of those claims.

(4) I forever relinquish all claims, demands, rights of action, suits, and judgments, that I have ever had or will have, or which my heirs, executors, administrators, or assigns ever had or ever may have, relating to United States actions and policies affecting claims relating to Holocaust deportation, any associated litigation, and the United States' administration of those claims.

(5) I declare under penalty of perjury that I have not received, and will not at any time claim, any compensation under French programs relating to Holocaust deportation or under any international agreements concluded by the Government of the French Republic relating to Holocaust deportation.

(6) I declare under penalty of perjury that I have not received any compensation under any other State's compensation program relating specifically to Holocaust deportation or under the compensation programs of any foreign institution relating specifically to Holocaust deportation.

\_\_\_\_\_  
(signature)

Subscribed and sworn to before me the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public  
(seal or stamp must be affixed)



Accord entre

le Gouvernement des États-Unis d'Amérique

et le Gouvernement de la République française

sur

l'indemnisation de certaines victimes de la Shoah

déportées depuis la France,

non couvertes par des programmes français

Le Gouvernement des États-Unis d'Amérique,

et

Le Gouvernement de la République française,

ci-après dénommés conjointement « les Parties »,

Désireux de développer davantage les relations entre leurs deux pays dans un esprit d'amitié et de coopération et de résoudre certaines difficultés du passé,

Reconnaissant et condamnant les horreurs de la Shoah, notamment la tragique déportation de Juifs depuis la France pendant la Seconde Guerre mondiale,

Notant que depuis 1946, le Gouvernement de la République française a mis en œuvre des mesures substantielles en vue de restituer les biens ou d'indemniser des victimes des persécutions antisémites perpétrées pendant la Seconde Guerre mondiale par les autorités allemandes d'Occupation ou le Gouvernement de Vichy, notamment un programme de pensions destiné à réparer les torts subis par les victimes de la Shoah déportées depuis la France et un programme spécifique pour les orphelins,

Notant que le Gouvernement de la République française reste engagé à verser, par de telles mesures au bénéfice des personnes éligibles au titre des programmes français, une indemnisation pour les torts subis par les victimes de la Shoah déportées depuis la France,

Rappelant que le 16 juillet 1995, le Président de la République française a solennellement reconnu la responsabilité de l'État dans le processus de déportation de ces victimes et une dette imprescriptible à leur égard,

Reconnaissant que certaines victimes de la Shoah déportées depuis la France, leur conjoint survivant et leurs ayants droit, n'ont pu avoir accès au programme de pensions établi par le Gouvernement de la République française pour les ressortissants français, ou par des accords internationaux conclus par le Gouvernement de la République française dans ce domaine,

Ayant mené des discussions dans un esprit d'amitié et de coopération avec l'objectif partagé de résoudre par le dialogue des questions liées à la non-couverture de ces personnes,

Résolus d'un commun accord et en adoptant une démarche amiable, extrajudiciaire et non contentieuse, à traiter la question de l'indemnisation de ces personnes,

Convaincus qu'il est de l'intérêt des deux Parties de garantir l'immunité d'État souverain étranger de la France s'agissant des demandes relatives à la déportation liée à la Shoah et de fournir par le présent Accord un mécanisme d'indemnisation pour toutes les demandes présentées par ces personnes,

Reconnaissant qu'il ne peut être demandé à la France, ayant accepté d'indemniser justement et équitablement ces personnes au titre du présent Accord, ni attendu de celle-ci de satisfaire toute autre demande liée à la déportation depuis la France pendant la Seconde Guerre mondiale présentées devant toute juridiction ou toute autre instance, aux États-Unis d'Amérique ou ailleurs,

Notant que le présent Accord constitue l'instrument exclusif et définitif permettant de répondre à ces demandes, entre les États-Unis d'Amérique et la France,

Notant l'intention des Parties que le présent Accord garantisse à la France, dans toute la mesure du possible, une paix juridique durable concernant toutes demandes ou initiatives portant sur la déportation de victimes de la Shoah depuis la France,

Ayant tous deux consulté différentes parties prenantes au sujet de la déportation liée à la Shoah, notamment des représentants des communautés juives, des demandeurs et des parlementaires,

Convaincus que le présent Accord fournira, dans les meilleurs délais possibles, le mécanisme permettant d'indemniser de manière juste et rapide les victimes de la déportation désormais âgées,

Ont convenu ce qui suit:

#### **Article 1<sup>er</sup>**

Aux fins du présent Accord, et sauf indication contraire spécifiée par l'utilisation d'un terme spécifique:

1. Le terme « France » désigne la République française, le Gouvernement de la République française, toute agence ou entité publique actuelle ou passée du Gouvernement français (qu'elle appartienne en totalité ou majoritairement à la République française), les entités qui leur succèdent quel que soit leur statut, et tout fonctionnaire, employé ou agent de la République française agissant dans l'exercice de ses fonctions, de son emploi ou de son mandat.
2. Les termes « ressortissants français » désignent toutes personnes physiques qui, à la date de l'entrée en vigueur du présent Accord, sont des nationaux de la République française.
3. Les termes « déportation liée à la Shoah » désignent le transfert d'un individu depuis la France vers une destination située hors de France dans le cadre des persécutions antisémites exercées par les autorités allemandes d'Occupation ou par le Gouvernement de Vichy pendant la Seconde Guerre mondiale.
4. Les termes « demande au titre de la déportation liée à la Shoah » désignent une demande d'indemnisation ou toute autre réparation concernant la déportation liée à la Shoah.

## Article 2

Le présent Accord a pour objectifs :

1. De fournir un mécanisme exclusif d'indemnisation des personnes ayant survécu à la déportation depuis la France, leur conjoint survivant ou leurs ayants droit, qui n'ont pu avoir accès au programme de pensions établi par le Gouvernement de la République française pour les ressortissants français, ou par des accords internationaux conclus par le Gouvernement de la République française traitant de la déportation liée à la Shoah;
2. D'instaurer une obligation internationale contraignante pour les États-Unis d'Amérique visant à reconnaître et à protéger activement l'immunité d'État souverain étranger de la France au sein du système juridique des États-Unis d'Amérique s'agissant des demandes au titre de la déportation liée à la Shoah et, conformément à leur système constitutionnel, d'entreprendre toutes actions nécessaires pour garantir une paix juridique

durable au niveau fédéral, celui des États et celui des autorités locales du Gouvernement des États-Unis d'Amérique.

### **Article 3**

1. Le présent Accord ne s'applique pas aux demandes au titre de la déportation liée à la Shoah présentées par des ressortissants français.
2. Le présent Accord ne s'applique pas aux demandes au titre de la déportation liée à la Shoah présentées par des ressortissants d'autres pays qui ont reçu ou sont éligibles à une indemnisation au titre d'un accord international conclu par le Gouvernement de la République française traitant de la déportation liée à la Shoah.
3. Le présent Accord ne s'applique pas aux personnes qui ont reçu ou sont éligibles à une indemnisation au titre du programme d'indemnisation français instituant des réparations pour les orphelins dont les parents sont morts en déportation (Décret n° 2000-657 du 13 juillet 2000).
4. Le présent Accord ne s'applique pas aux demandes au titre de la déportation liée à la Shoah présentées par des personnes qui ont reçu une indemnisation au titre du programme d'un autre État accordant une indemnisation spécifique pour la déportation liée à la Shoah, ou qui ont reçu une indemnisation au titre de tout programme de toute institution accordant une indemnisation spécifique pour la déportation liée à la Shoah.

### **Article 4**

1. Dans un délai de trente (30) jours à compter de la date d'entrée en vigueur du présent Accord, le Gouvernement de la République française transfère au Gouvernement des États-Unis d'Amérique une somme de 60 millions de dollars américains, au bénéfice du Gouvernement des États-Unis d'Amérique pour effectuer des indemnisations au titre du présent Accord, dans les conditions prévues à l'article 6.
2. Les Parties conviennent que ce paiement constitue, entre les États-Unis d'Amérique et la France, le moyen définitif, global et exclusif de répondre à toutes demandes au titre de la déportation liée à la Shoah non couvertes par les programmes d'indemnisation existants, qui ont été ou pourraient

être formulées à l'encontre de la France aux États-Unis d'Amérique ou en France.

3. Les Parties conviennent en outre que tout paiement à une personne physique au titre du présent Accord constitue un moyen définitif, global et exclusif de répondre à toutes les demandes de cette personne physique au titre de la déportation liée à la Shoah, non couvertes par les programmes de compensation existants, qui ont été ou pourraient être formulées à l'encontre de la France dans quelque instance que ce soit.
4. Conformément aux procédures nationales en vigueur aux États-Unis d'Amérique, le Gouvernement des États-Unis d'Amérique dépose les montants reçus du Gouvernement de la République française sur un compte portant intérêt au Département du Trésor des États-Unis d'Amérique en attendant qu'ils soient répartis, conformément à une décision du Secrétaire d'État des États-Unis d'Amérique ou de son mandataire.

#### Article 5

Lors du paiement de la somme visée à l'Article 4 du présent Accord, le Gouvernement des États-Unis d'Amérique:

1. Confirme, par le présent Accord, pour toute demande au titre d'une déportation liée à la Shoah, qu'il reconnaît :

(i) l'immunité d'État souverain étranger de la France et des biens appartenant à la France ; et

(ii) l'immunité diplomatique, consulaire ou officielle des fonctionnaires, employés et agents français et des biens de chacun d'eux,

en tant que ces immunités souveraines, diplomatiques, consulaires et officielles sont normalement reconnues par le système juridique des États-Unis aux États étrangers, leurs agences ou entités publiques, fonctionnaires, employés et agents ainsi que pour les biens de chacun d'eux.

2. S'assure, au besoin avec l'aide du Gouvernement de la République française, dans les plus brefs délais possibles, de la clôture de toute

procédure pendante ou future pouvant être engagée, devant tout tribunal à tout niveau du système juridique des États-Unis, à l'encontre de la France en ce qui concerne toute demande au titre d'une déportation liée à la Shoah.

3. Entreprend, dans les meilleurs délais et conformément à son système constitutionnel, toutes les actions nécessaires pour atteindre les objectifs du présent Accord, notamment une paix juridique durable au niveau fédéral, celui des États et celui des autorités locales du Gouvernement des États-Unis d'Amérique, et évite toute mesure :
  - a. qui contredise les termes de l'Accord en particulier remette en cause l'immunité souveraine de la France en ce qui concerne toute demande au titre d'une déportation liée à la Shoah ; ou
  - b. qui font obstacle à l'application et l'exécution de l'Accord.
4. Demande, avant qu'il soit procédé à tout versement de répartition à un bénéficiaire éligible en vertu du présent Accord, que ce dernier signe un document conforme à l'Annexe jointe au présent Accord, comportant (i) une renonciation du bénéficiaire à tous ses droits à faire valoir des demandes d'indemnisation ou d'autres demandes de réparation à l'encontre de la France, dans quelque instance que ce soit, concernant la déportation liée à la Shoah ou des régimes de pensions y afférents ; (ii) une déclaration attestant que le bénéficiaire n'a perçu et ne demandera aucun paiement au titre de programmes français ou d'un accord international conclu par le Gouvernement de la République française en ce qui concerne la déportation liée à la Shoah ; et (iii) une déclaration attestant que le bénéficiaire n'a perçu aucun paiement au titre du programme d'indemnisation d'un autre État ou du programme d'indemnisation de toute institution étrangère portant spécifiquement sur la déportation liée à la Shoah.

## Article 6

1. Le Gouvernement des États-Unis d'Amérique répartit la somme visée à l'article 4(1) du présent Accord selon des critères qu'il définit unilatéralement, discrétionnairement, et dont il est seul responsable.
2. Nonobstant le paragraphe précédent:



- a. En définissant les critères de répartition de la somme visée à l'article 4(1), les États-Unis tiennent compte des objectifs du présent Accord énoncés à l'article 2.
  - b. Les demandes au titre d'une déportation liée à la Shoah émanant d'une personne relevant du champ d'application des articles 3(1), 3(2), 3(3) ou 3(4) du présent Accord ne sont pas éligibles à une indemnisation au titre du présent Accord et après avoir établi qu'une demande relève des articles 3(1), 3(2), 3(3) ou 3(4), les États-Unis doivent déclarer cette demande irrecevable et la rejeter.
  - c. Pour établir si une demande relève du champ d'application de l'article 3(1), aux fins de gestion de la répartition des indemnisations, les États-Unis d'Amérique s'appuient sur les déclarations sur l'honneur de nationalité figurant au premier paragraphe du document constituant l'Annexe au présent Accord. Pour établir si une demande relève de l'article 3(2), 3(3) ou 3(4), aux fins de gestion de la répartition des indemnisations, les États-Unis s'appuient sur les points 5 et 6 des déclarations sur l'honneur figurant dans le document constituant l'Annexe au présent Accord, ainsi que sur toute éventuelle information pertinente obtenue en vertu de l'article 6(6) du présent Accord.
3. Le Gouvernement des États-Unis d'Amérique ou une entité désignée par lui jouit d'une compétence exclusive pour répartir la somme visée à l'article 4(1) du présent Accord, et la France n'a aucun droit en ce qui concerne cette répartition.
4. Le Gouvernement des États-Unis d'Amérique prend des mesures raisonnables pour notifier, suffisamment à l'avance, des informations sur la répartition des fonds en vertu du présent Accord aux personnes susceptibles de répondre aux critères établis par le Gouvernement des États-Unis d'Amérique en vertu de l'article 6(1) du présent Accord.
5. Conformément aux procédures nationales en vigueur aux États-Unis d'Amérique, le Gouvernement des États-Unis d'Amérique prévoit un délai approprié pour la présentation des demandes d'indemnisation au titre du présent Accord.
6. Sous réserve de leur législation respective, les Parties échangent des informations utiles à la mise en œuvre du présent Accord, notamment des



informations requises pour garantir qu'aucun demandeur ne reçoive de paiement indu en application de l'article 6(2) (b) du présent Accord.

7. A la demande du Gouvernement de la République française, le Gouvernement des États-Unis d'Amérique fournit chaque année un rapport sur la mise en œuvre du présent Accord comportant au minimum des données statistiques relatives aux versements et aux catégories de bénéficiaires. Cette obligation expire dans un délai d'un an à compter de la date à laquelle les États-Unis ont achevé la répartition de la somme visée à l'article 4(1) du présent Accord, ainsi que prévu à l'article 6(1) du présent Accord.

#### Article 7

L'Annexe ci-jointe fait partie intégrante du présent Accord.

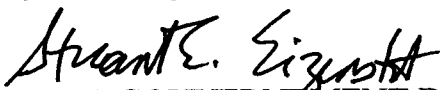
#### Article 8

Tout différend lié à l'interprétation ou l'application du présent Accord est réglé exclusivement par voie de consultations entre les Parties.

#### Article 9

Chaque Partie notifie à l'autre l'accomplissement des formalités nationales nécessaires pour l'entrée en vigueur du présent Accord, qui intervient le premier jour du deuxième mois suivant la date de réception de la dernière notification. Les Parties prennent acte du fait qu'à son entrée en vigueur, le présent Accord impose des obligations internationales contraignantes.

Fait à Washington, D.C., le 8 décembre 2014, en double exemplaire, en langues française et anglaise, les deux textes faisant également foi.

  
POUR LE GOUVERNEMENT DES  
ÉTATS-UNIS D'AMÉRIQUE:

  
POUR LE GOUVERNEMENT DE  
LA RÉPUBLIQUE FRANÇAISE:

## ANNEXE

à l'Accord entre le Gouvernement des États-Unis d'Amérique  
et le Gouvernement de la République française  
sur l'indemnisation de certaines victimes de la Shoah déportées depuis la France  
non couvertes par des programmes français.

**Formulaire de déclaration sur l'honneur à signer par tout bénéficiaire  
d'indemnisation avant de percevoir un versement au titre du présent  
Accord.**

## FORMULAIRE

Je soussigné, \_\_\_\_\_, ressortissant de  
\_\_\_\_\_ [pays] \_\_\_\_\_ (une copie de documents officiels  
établissant la nationalité doit être jointe au présent engagement écrit), accepte  
par la présente de percevoir une somme égale à \_\_\_\_\_ au titre du  
règlement intégral et définitif de toute demande relevant du champ d'application  
de l'Accord entre le Gouvernement des États-Unis d'Amérique et le  
Gouvernement de la République française relatif à l'indemnisation de certaines  
victimes de la Shoah déportées depuis la France non couvertes par des  
programmes français ("l'Accord") signé à [ville] \_\_\_\_\_ le  
\_\_\_\_\_ [date/mois/année] \_\_\_\_\_. *Les termes et expressions utilisés dans  
la présente déclaration écrite ont le sens prescrit dans l'Accord.*

Dès réception de la somme visée:

(1) Je dégage définitivement de toute responsabilité de quelque nature que  
ce soit pour toute demande ayant trait à la déportation liée à la Shoah la France  
ainsi que tout ressortissant français (y compris des personnes physiques et  
morales).

(2) Je renonce définitivement à toute réclamation, toute demande, tout  
droit de poursuite, à toute action en justice, et à tout recours passé ou futur, pour  
moi-même ou mes héritiers, exécuteurs testamentaires, administrateurs ou  
ayants droits en ce qui concerne la déportation liée à la Shoah.

(3) Je dégage définitivement de toute responsabilité de quelque nature que  
ce soit portant sur la déportation liée à la Shoah, le Gouvernement des États-  
Unis d'Amérique, ses agences ou entités publiques, ainsi que les fonctionnaires,  
employés et agents du Gouvernement des États-Unis ou des agences et entités

publiques des États-Unis d'Amérique, sur les actions et politiques des États-Unis concernant ces demandes, sur tout litige connexe ainsi que sur l'administration de ces demandes par les États-Unis.

(4) Je renonce définitivement à toute réclamation, toute demande, tout droit de poursuite, à toute action en justice, et à tout recours, passé ou futur, pour moi-même ou mes héritiers, exécuteurs testamentaires, administrateurs ou ayants droit en ce qui concerne les actions et politiques des États-Unis relatives à des demandes portant sur la déportation liée à la Shoah, sur tout litige connexe ainsi que sur l'administration de ces demandes par les États-Unis.

(5) Je déclare sous peine de parjure que je n'ai perçu et ne demanderai à aucun moment une indemnisation au titre de programmes français relatifs à la déportation liée à la Shoah ou de tout autre accord international conclu par le Gouvernement de la République française en ce qui concerne la déportation liée à la Shoah.

(6) Je déclare sous peine de parjure que je n'ai perçu aucune indemnisation au titre du programme d'indemnisation de tout autre État portant spécifiquement sur la déportation liée à la Shoah ou de programmes d'indemnisation de toute institution étrangère portant spécifiquement sur la déportation liée à la Shoah.

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(Signature)

Signé et déclaré sous serment par devant moi le \_\_ \_\_\_\_, 20\_\_.

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Notaire  
(Le seau ou le timbre doit  
être apposé)

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limit of Seventh Circuit Rule 29 because it contains 6,912 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 Garamond 14-point font, a proportionally spaced typeface.

s/ Lewis S. Yelin  
Counsel for the United States

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2018, I electronically submitted the foregoing brief to the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system, along with a motion seeking leave to file this brief one day out of time. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with Seventh Circuit Rule 31(b) and ECF Procedure (h)(2).

Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lewis S. Yelin  
Counsel for the United States