Cassirer v. Kingdom of Spain: Did the Exhaustion of Remedies Doctrine Find Its Way into Claims Under the Foreign Sovereign Immunities Act?

I. OVERVIEW

The persecution of Jews in Nazi Germany during the year 1939 left Lilly Cassirer, a member of a wealthy Jewish family, in the unfortunate situation of being forced to abandon one of her most valuable belongings.[1] While many Jews stayed in Germany, Lilly requested permission from the then Nazi Government to leave the country with her possessions, including the valuable painting "Rue Saint-Honoré, Après-Midi, Effet de Pluie" (Painting) by French impressionist Camille Pissarro.[2] Lilly was granted permission to leave; however, the Nazis forbade her to take the Painting out of Germany.[3] Consequently, she was forced to relinquish the Painting to a Nazi official, fearing denial of her permission to leave.[4] The Painting was subsequently sold, first by the Nazi party and then by several different purchasers, until it was ultimately acquired by a famous private art collector, Baron Hans-Heinrich Thyssen-Bornemisza (Baron), in the late 1970s.[5] The Baron's

1. *See* Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1052 (9th Cir.), *reh'g granted*, 590 F.3d 981 (9th Cir. 2009).

2. *Id.*

3. *Id.* The Nazi Government, pursuant to Lilly's request to leave Germany, appointed an art dealer to appraise the artwork that she was planning to take with her. *Id.* After appraisal of Lilly's artwork, the art dealer refused to allow Lilly to take the Painting with her and demanded that the Painting be sold to him for a nominal amount. *Id.* Fearing that her permission to leave Germany would be revoked, Lilly complied with the art dealer's demand. *Id.*

4. *Id.*

5. *Id.* at 1052-53. The art dealer appointed by the Nazi Government sold the Painting to another art dealer who took the Painting out of Germany and brought it to Holland. *Id.* After the

art collection is currently managed by the Thyssen-Bornemisza Collection Foundation (Foundation), and the Painting is now on display at the Thyssen-Bornemisza Museum in Madrid, Spain.[6]

The Cassirer family lost track of the Painting until the year 2000, when Claude Cassirer (Cassirer), the grandson and heir of Lilly Cassirer, discovered that the Painting was being exhibited at the Foundation's museum in Madrid.[7] The same year, Cassirer requested that Spain's Minister for Education, Culture and Sports, who was a member of the Foundation's board of directors, facilitate the return of the Painting to his family's possession, but the petition was rejected.[8] In July of 2003, five U.S. congressmen wrote a letter to the same minister, on behalf of Cassirer, requesting the Painting be returned to the Cassirer family.[9] This request was also rejected.

Cassirer did not attempt to repossess the Painting through the Spanish courts.[10] Instead, on May 10, 2005, Cassirer brought suit in the Central District of California against the Foundation and the Kingdom of Spain (Spain) pursuant to the Foreign Sovereign Immunities Act (FSIA), alleging that the Painting had been taken from his family in violation of international law and thus should be returned to his family's possession.[11] Both Spain and the Foundation filed motions to dismiss, arguing that the court lacked subject matter jurisdiction, and that neither the Foundation nor Spain took the Painting in violation of international law.[12] Therefore, the defendants argued further, the expropriation exception to sovereign

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German invasion of Holland, the Gestapo (the German Secret Police) discovered and confiscated the Painting. *Id.* The Painting was brought back to Germany, where it was sold to an anonymous purchaser in 1943. *Id.* In 1952, the Painting appeared in a New York commercial gallery, where it was sold to a private collector who subsequently sold it to an anonymous buyer. *Id.* This anonymous buyer ultimately sold the Painting to Baron Hans-Heinrich Thyssen-Bornemisza at some point between the late 1970s and early 1980s. *See id.*

6. *Id.* at 1051, 1053. Spain originally leased the Foundation's collection, including Cassirer's painting, but in 1988 decided to purchase the entire collection. *Id.* at 1053. Under the purchase agreement, Spain provided the Foundation with a palace (today known as the Thyssen-Bornemisza Museum) in the city of Madrid in which the entire collection was to be displayed. *Id.* However, if the Foundation is ever dissolved, the agreement stipulates that Spain would become the sole owner of the whole collection, including the Painting. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Under the FSIA, a foreign sovereign is immune unless one of the specific exceptions stated in the Act applies. *Id.* at 1055.

12. *See id.* at 1053.

immunity found in the FSIA should not apply.[13] In addition, Spain argued that Cassirer's claim should be dismissed because he did not exhaust judicial remedies in Spain before bringing suit in the United States.[14] On August 30, 2006, the district court held that exhaustion of remedies was not required in order to file a claim under the FSIA and that the expropriation exception applied even though neither the Foundation nor Spain was the entity or sovereign state that took the Painting in violation of international law.[15] The United States Court of Appeals for the Ninth Circuit *held*, as a matter of first impression, that the expropriation exception under the FSIA does not require the state against whom the claim is brought to be the one who expropriated the property in violation of international law, and therefore, remanded the case to the district court for determination of whether judicial imposition of an exhaustion of remedies requirement was warranted in this particular case. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1064 (9th Cir. 2009).

II. BACKGROUND

A. Sovereign Immunity Before 1952

The United States adhered to an absolute theory of immunity until 1952.[16] According to this theory, "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign."[17] Prior to the enactment of the FSIA, the United States Supreme Court's opinion in *The Schooner Exchange v. McFaddon*[18] was generally considered "the source of [U.S.] foreign sovereign immunity jurisprudence."[19] In that case, the Supreme Court upheld a French plea of immunity against suit by American citizens who claimed title to an armed national vessel of France that had entered U.S. waters.[20] Pursuant to the Attorney General's suggestion of immunity, the Supreme Court adhered to principles of public international law in holding that "national

13. *See id.* The expropriation exception to sovereign immunity provides that a "foreign state shall not be immune . . . in any case . . . in which rights in property taken in violation of international law are in issue." *Id.*

14. *Id.* at 1059.

15. *See id.* at 1053-54. The district court found, therefore, that neither the Foundation nor Spain were immune. *See id.* at 1054.

16. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), *in* 26 DEP'T ST. BULL., June 1952, at 984-85.

17. *Id.*

18. 11 U.S. (7 Cranch) 116 (1812).

19. Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004).

20. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117, 147.

ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[21] Although the Supreme Court's decision appeared to be narrowly focused on the facts of the case, the exception became the rule, and the absolute immunity doctrine soon spread to "other types of State-owned property."[22] From 1812 to 1952, U.S. federal courts deferred the question of whether to exercise jurisdiction over sovereign states to the executive branch—more specifically, to the Attorney General—who, following the absolute theory of immunity, always suggested immunity for those foreign states that maintained good relations with the United States.[23]

In 1952, the acting legal adviser of the State Department, Jack Tate, sent a letter to the Attorney General, Philip Perlman, announcing that the State Department had decided to adopt the "restrictive theory" of sovereign immunity.[24] The State Department reasoned that "the widespread and increasing practice on the part of governments of engaging in commercial activities [made] necessary a practice [that] will enable persons doing business with them to have their rights determined in the courts."[25] Therefore, according to this restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[26]

This new theory of sovereign immunity was closely aligned with the practices of other nations,[27] but unfortunately had no effect on the approach taken by U.S. courts to analyze sovereign immunity.[28] First, courts still deferred the "initial responsibility for deciding questions of sovereign immunity" to the U.S. Attorney General, who usually suggested immunity for foreign states.[29] Second, the State Department never made the essential distinction between public and private acts.[30] Last, the Attorney General's suggestions were sometimes tainted by political pressure, leaving the courts with conflicting rules and disparate

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21. *Id.* at 145-46.
22. *See* Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiques Cases*, 31 FORDHAM INT'L L.J. 781, 787 (2008).
23. *See* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486-87 (1983).
24. Tate, *supra* note 16, at 984.
25. *Id.* at 985.
26. *Id.* at 984.
27. *See id.*
28. *See Verlinden B.V.*, 461 U.S. at 487.
29. *Id.*
30. Redman, *supra* note 22, at 788.

results.[31] The Supreme Court recognized these flaws in *Verlinden B.V. v. Central Bank of Nigeria*, in which the majority stated:

> [T]he responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions. . . . Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied.[32]

This lack of uniformity and unclear standards in the application of the restrictive theory of sovereign immunity paved the way for congressional intervention.[33]

B. The Foreign Sovereign Immunities Act

The United States Congress enacted the FSIA in 1976 in an attempt to "replace[] the regime of deference to Executive suggestion with a comprehensive legislative framework."[34] The FSIA codified the restrictive theory of immunity as it was first promulgated by the State Department and placed in the courts the determination of whether immunity applied to a particular defendant.[35] The Act provides that a foreign state is immune from the jurisdiction of U.S. federal and state courts, except in certain situations that are stipulated in subsequent sections of the FSIA.[36] To this end, the Supreme Court has noted that the enumerated "exceptions are central to the Act's functioning: 'At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application."[37] Where subject matter jurisdiction is found, personal jurisdiction will automatically follow, provided that service has been properly made.[38] The exceptions to sovereign immunity can be found in §§ 1605 and 1607

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31. *Id.*
32. 461 U.S. at 487-88.
33. Redman, *supra* note 22, at 788.
34. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 705 (9th Cir. 1992).
35. *See* H.R. REP. No. 94-1487, at 7 (1976). Section 1602 of the FSIA provides that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." 28 U.S.C. § 1602 (2006).
36. 28 U.S.C. § 1604.
37. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) (quoting Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 493-94 (1983)).
38. 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim . . . over which the district courts have [subject matter] jurisdiction under subsection (a) . . . .").

of the FSIA.[39] Although the "commercial activity" exception to sovereign immunity is considered one of the most important exceptions found in the Act, another exception to sovereign immunity that is of great importance—not only for its potentially broad application, but also because it "is absent from nearly all other recent codifications of sovereign immunity law" throughout the international community—is the expropriation exception.[40] This exception provides:

> (a) 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 Unites States.[41]

Departure from the international community's standard suggests that Congress, by including the expropriation exception in the FSIA, intended to provide both a remedy to those who are "victims of nationalizations" and a punishment of those states that have taken property without "just compensation."[42]

Despite the inclusion of the expropriation exception, some courts still restricted the application of the FSIA retrospectively, applying it only to situations that occurred after 1952.[43] This issue provoked a split between courts until 2004, when the Supreme Court held in *Republic of*

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39. *See id.* §§ 1605, 1607. Some of the exceptions enumerated in § 1605 include waivers of immunity, actions based upon commercial activity that causes a direct effect in the United States, and issues related to rights in property in the United States acquired by succession or gift. *See id.* § 1605(a)(1), (2), (4). In addition to these exceptions, Congress stipulated that "the foreign state shall not be accorded immunity with respect to any counterclaim" listed in § 1607. *Id.* § 1607.

40. *See* CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 54 (1988). The ILA Montreal Draft Convention on State Immunity of 1982, Montreal Draft, 22 I.L.M. 287 (1983), includes in its article III G. a provision on expropriation exception to sovereign immunity similar to the expropriation exception found in the FSIA. At this stage, however, a final draft has not been formed.

41. 28 U.S.C. § 1605(a)(3).

42. SCHREUER, *supra* note 40, at 56.

43. *See* 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3662 (3d ed. 1998); *see also* Jackson v. People's Republic of China, 794 F.2d 1490, 1491 (11th Cir. 1986) (stating that to give the FSIA retrospective application to pre-1952 events would interfere with antecedents rights of other sovereigns); Djordjevich v. Bundesminister Der Finanzen, F.R.G., 827 F. Supp. 814, 817 (D.D.C. 1993) (holding that the FSIA did not apply to the taking of property that took place in 1941).

Austria v. Altmann that the FSIA applies retrospectively to cases arising from pre-1952 actions.[44]

The plaintiff in *Altmann* was the niece of Ferdinand Bloch-Bauer, "a wealthy sugar magnate" who resided in Vienna along with his wife until 1938, when Austria was annexed by Nazi Germany.[45] Bloch-Bauer, a Czechoslovakian Jew, fled the country that same year when the Nazis invaded, leaving behind his belongings, including several valuable paintings by Gustav Klimt.[46] A Nazi lawyer who was in charge of liquidating Bloch-Bauer's estate kept six of these paintings and later sold three to the Austrian Gallery.[47] The Austrian Gallery kept Bloch-Bauer's paintings and declined to return them to their original owner.[48] The central issue in the case was whether the FSIA provided the court with jurisdiction under the expropriation exception when the actions complained of occurred prior to its passage.[49] The majority stated that "applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims."[50] Accordingly, the Supreme Court's decision to exercise jurisdiction under the FSIA over expropriations that had been committed before 1952 represents a broad expansion of the "jurisdiction-conferring provisions" of the Act.[51]

U.S. courts have increasingly expanded the application of FSIA exceptions, especially the commercial activity exception.[52] An initial step in the development of FSIA case law was the Supreme Court decision in *Argentine Republic v. Amerada Hess Shipping Corp.*[53] In that case, two

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44. 541 U.S. 677, 700 (2004).

45. *Id.* at 681.

46. *Id.* at 681-82. Gustav Klimt was a prominent Austrian Symbolist painter and member of the Vienna Secession movement. Jane Kallir, *In Search of the "Total Artwork": Klimt, the Secession and the Wiener Werkstätte*, *in* GUSTAV KLIMT: IN SEARCH OF THE "TOTAL ARTWORK" 21-22 (Jane Kallir & Alfred Weidinger eds., 2009).

47. *Altmann*, 541 U.S. at 682.

48. *Id.* at 684-85. Bloch-Bauer's wife died in 1925, leaving a will in which she asked Bloch-Bauer to "bequeath" the paintings to the Austrian Gallery. *Id.* at 681-82. However, Bloch-Bauer never transferred ownership to the Gallery. *Id.* at 682.

49. *Id.* at 681.

50. *Id.* at 699.

51. *See* Redman, *supra* note 22, at 791.

52. *Id.* at 790. *See generally* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (holding that the issuance of bonds by the Argentinean government was a commercial activity under the FSIA); Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879 (D.C. Cir. 1988) (stating that complaints for breach of contract and promissory estoppel fall within the commercial activity exception).

53. *See* 488 U.S. 428 (1989).

Liberian corporations filed suit in the district court against Argentina, alleging that the Argentinean armed forces had damaged their vessel during the Falkland war.[54] The plaintiffs invoked jurisdiction under the Alien Torts Statute (ATS), but the district court dismissed the complaint for lack of subject matter jurisdiction, finding that the FSIA precluded the plaintiffs from bringing suit.[55] The case reached the Supreme Court, which ultimately affirmed the district court's decision, holding that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court" and that no exception to the FSIA applied to the case.[56]

Jurisdiction under the FSIA expropriation exception rested "in part on the character of a plaintiff's claim . . . and in part on the existence of one or the other of two possible 'commercial activity' nexi between the United States and the defendants."[57] First, a plaintiff that invokes the expropriation exception will have to show that the property in question has been taken in violation of international law.[58] In *Siderman de Blake v. Republic of Argentina*, the Ninth Circuit Court of Appeals stated the necessary elements of a valid taking under international law.[59] First, a taking violates international law if it is not for a public purpose, if it is discriminatory, or if no just compensation is provided for the taking.[60] Second, the plaintiff must show that the property at issue "or any

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54. *Id.* at 431-32. In 1982, Argentina declared war against Great Britain over a set of islands called *Islas Malvinas* (also known by the British as the Falkland Islands), located in the Atlantic Ocean off the coast of Argentina. *Id.* at 431. While these two countries were at war, the oil tanker HERCULES was returning to Alaska from its trip to the Virgin Islands. *Id.* The HERCULES, owned by a Liberian corporation, was chartered to another Liberian corporation that used the ship to transfer crude oil from Alaska to the Virgin Islands. *Id.*

55. *Id.* at 432-33. The Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute (ATS), provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006).

56. *Amerada Hess*, 488 U.S. at 439.

57. *See* Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 940 (D.C. Cir. 2008). "Commercial activity" is "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

58. *See* 28 U.S.C. § 1605(a)(3). "[T]he exception does not apply where the plaintiff is a citizen of the defendant country at the time of the expropriation, because '[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.'" Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992) (quoting Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990)).

59. *See* 965 F.2d at 711.

60. *See id.* (citing West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 (9th Cir. 1987)); 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

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 the property is "owned or operated by an agency or instrumentality of the foreign state and that agency . . . is engaged in a commercial activity in the United States."[61] The *Siderman de Blake* court stated that the central question regarding the commercial activity requirement found in the expropriation exception is "whether the activity is of a kind in which a private party might engage."[62] Therefore, the commercial activity requirement will be met in cases where the plaintiff can show some commercial connection between the state (or its agent or instrumentality) and the United States.[63]

C. Exhaustion of Remedies as a Defense to the Expropriation Exceptions

The finding of subject matter jurisdiction under the FSIA, however, does not guarantee that a court will hear the case. Courts have refrained from exercising jurisdiction based on legal principles such as forum non conveniens, the act of state doctrine, or the political question doctrine.[64] Even so, courts recently have encountered a line of defense that was seldom used in the context of the expropriation exception, that is, the exhaustion of local remedies.[65] This doctrine is a rule of customary international law that requires courts to abstain from hearing cases in which a state has violated international law until the plaintiff has exhausted all possible remedies available in the foreign state.[66] The

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61. 28 U.S.C. § 1605(a)(3).

62. 965 F.2d at 708 (quoting Joseph v. Office of the Consulate Gen. of Nig., 830 F.2d 1018, 1024 (9th Cir. 1987)).

63. *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614-15 (1992) (holding that the issuance of "*Bonods*" (debt instruments used to refinance the national debt) was a commercial activity under the FSIA); *Siderman de Blake*, 965 F.2d at 712 (finding commercial connection to the United States when the foreign state advertised an expropriated hotel in the United States, solicited guests through a United States agent, and a large number of Americans stayed in the hotel).

64. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (dismissing the case on forum non conveniens grounds); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (stating that the act of state doctrine precludes courts from inquiring into the validity of public acts of foreign sovereigns committed within its own territory); Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57 (2d Cir. 2005) (dismissing the claims under the political question doctrine).

65. *See, e.g.*, Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 948 (D.C. Cir. 2008); Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 306 (D.D.C. 2005).

66. Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21); *see also* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 (1987). However, the Restatement (Third) of Foreign Relations Law addresses claims between two states, while § 1605(a)(3) "involves . . . suit[s] that necessarily pit[] an individual of one state against another state, in a court that by definition cannot be in *both* the interested states." *Agudas Chasidei*

Supreme Court recognized the importance of this rule in the 1964 case *Banco Nacional de Cuba v. Sabbatino*, stating that "the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."[67]

At least one court has suggested that an exhaustion requirement could be read in the context of the ATS.[68] The Ninth Circuit in *Sarei v. Rio Tinto, PLC*, remanded the case to the district court for determination of whether to impose an exhaustion requirement on the plaintiff.[69] According to the court, "[t]he defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies."[70] In addition, it will not be enough to "merely initiate a suit" in the foreign state.[71] The *Sarei* court required plaintiffs to "obtain a final decision of the highest court . . . in the legal system at issue."[72] The plurality opinion in *Sarei* relied on a footnote to *Sosa v. Alvarez-Machain*, where, although the Supreme Court declined to address the issue of exhaustion of remedies, it stated that it "would certainly consider [the exhaustion] requirement in an appropriate case."[73] The Ninth Circuit embraced the Supreme Court's language and concluded that *Sarei* was an appropriate case to consider whether exhaustion should be required.[74] The Ninth Circuit decision to require exhaustion of remedies in a prudential, case-by-case basis is supported by Justice Breyer's concurring opinion in *Altmann*. Justice Breyer stated in his opinion that "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking."[75] Despite the few occasions in

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Chabad, 528 F.3d at 949. The *Agudas Chasidei Chabad* court seems to suggest that plaintiffs are not required to exhaust local remedies before litigating in the United States. *See id.* at 948-49.

67. 376 U.S. 398, 422-23 (1964). In any case, parties are excused from the exhaustion of remedies requirement if those remedies would be inadequate or the process unreasonably prolonged. *See also* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. f ("[U]nder international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.").

68. *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 832 (9th Cir. 2008).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Consistent with the Restatement, however, the court would not require a plaintiff to exhaust remedies in a foreign state if the plaintiff can show "that the state of the law or availability of remedies would make further appeal futile." *Id.*

73. *Id.* at 927 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)).

74. *Id.* at 824.

75. Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004) (citing 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1987)).

which the Supreme Court has addressed the issue of exhaustion of remedies, an express reference to this requirement under the FISA has never been made.[76] Therefore, this issue remains to be settled.

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit relied on principles of statutory interpretation to determine that neither the Foundation nor Spain was entitled to sovereign immunity under the clear and unambiguous language of the FSIA.[77] In its analysis, the court held that the expropriation exception to sovereign immunity does not require that the sovereign state against whom a claim is brought be the one that actually expropriated the property in question in violation of international law.[78] The court also held that the Foundation acted as an agent or instrumentality of Spain, and further that the Foundation engaged in commercial activity in the United States sufficient to satisfy the FSIA nexus requirement.[79] Finally, the court remanded the case for the purpose of determining whether judicial imposition of exhaustion of remedies is warranted under the circumstances.[80]

The Ninth Circuit began by addressing subject matter jurisdiction. The court established that the determination of subject matter jurisdiction would ultimately depend on whether the defendants were entitled to sovereign immunity pursuant to the FSIA.[81] Thus the court quickly moved to address the expropriation exception found in the FSIA.[82] The majority declined to read the section as requiring that the foreign state against whom the claim has been brought also be the state that took the property in violation of international law.[83] The court concluded that the statute was not ambiguous and that the defendant's reading of the expropriation exception was inconsistent with congressional intent.[84] The

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76. *See Sarei*, 550 F.3d at 841-46 (Reinhardt, J., dissenting) (arguing that the Supreme Court had not "counseled" courts to adopt an exhaustion of remedies requirement, and neither was *Sarei* an appropriate case in which to address the issue of exhaustion); Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 949 (D.C. Cir. 2008) (suggesting that plaintiffs are not required to exhaust local remedies before litigating in the United States).

77. Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1058-59 (9th Cir.), *reh'g granted*, 590 F.3d 981 (9th Cir. 2009).

78. *Id.* at 1057.

79. *See id.* at 1057-58.

80. *Id.* at 1064.

81. *Id.* at 1055.

82. *See id.* at 1055-59.

83. *Id.* at 1056.

84. *Id.* The defendants urged the court to read the expropriation exception as including the language "by the foreign state," thus interpreting the exception to apply only where the

court emphasized that Congress, with the enactment of the FSIA, intended to grant jurisdiction over foreign states when those states act "like a private person by engaging in commercial activities" as opposed to undertaking "acts of a foreign state [that] are sovereign or governmental in nature."[85] Therefore, according to the court, the key to the expropriation exception to sovereign immunity is whether the state's actions were like those of a private person, and if they were, whether there is sufficient commercial activity to satisfy the nexus requirement.[86]

Having determined that the foreign state in possession of the expropriated property did not have to be the one that initially took the property in violation of international law, the Ninth Circuit next addressed whether the activity in which the Foundation (as Spain's agent) engaged was "of a kind in which a private party might engage."[87] The court looked for guidance in its prior analysis of commercial activity in *Siderman* and *Altmann* to conclude ultimately that the kind of activities in which the Foundation had engaged in the United States were sufficient to satisfy the commercial activity requirement of the expropriation exception.[88] Essential to this conclusion was the court's finding that "[m]uch of that activity was connected with the Painting."[89]

Finally, the Ninth Circuit addressed the issue of whether exhaustion of remedies was a prerequisite to adjudication under the FSIA.[90] In the absence of a clear judicial mandate of an exhaustion requirement, the majority engaged in statutory interpretation.[91] The court conceded that the plain language of § 1605(a)(3) does not require an exhaustion of local remedies for claims brought under the FISA.[92] However, the majority agreed that the FSIA is a jurisdictional statute incorporating "international law principles to guide U.S. courts in determining when a foreign state is or is not entitled to sovereign immunity."[93] Because the doctrine of exhaustion of remedies is a "well-established rule of customary international law,"[94] the court adopted the requirement of

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foreign state against whom the claim was brought was also the state that took the property in violation of international law. *Id.* at 1057.

85. *Id.* at 1056-57.
86. *See id.* at 1057.
87. *Id.* at 1058.
88. *Id.* at 1058-59.
89. *See id.* at 1059.
90. *See id.* at 1059-64.
91. *Id.*
92. *Id.* at 1059-60.
93. *Id.* at 1060.
94. *Id.* at 1061 (quoting Sarei v. Rio Tinto, PLC, 550 F.3d 822, 829 (9th Cir. 2008)).

exhaustion of remedies only "on a prudential case-by-case basis."[95] Thus the court remanded the case and proposed a framework for the district court to use in making this determination.[96] First, the defendant must plead the plaintiff's failure to exhaust local remedies.[97] Second, and only to the extent pled by the defendant, the district court must consider "whether Congress has clearly required exhaustion for the specific claims asserted in the complaint."[98] Where Congress has not clearly addressed exhaustion requirement, the district court must "determine whether the applicable substantive law would require exhaustion."[99] Third, the district court must address whether the defendant has shown that local remedies exist and have not been exhausted.[100] Finally, the district court may exercise its "sound discretion" in either requiring or waiving exhaustion based on prudential factors.[101]

Judge Ikuta's dissent challenged the majority's conclusion that an exhaustion requirement should be read into the FSIA even on a prudential case-by-case basis.[102] She argued that imposing a "judge-made" exhaustion requirement contrary to congressional intent would create uncertainty and inconsistency in the development of the law concerning FSIA claims.[103] She maintained that where a foreign state is not immune under the FSIA, it should be "treated like any other private individual litigant . . . because the state is acting as a private party rather than a sovereign exercising power over its own citizens."[104] She further criticized the majority's use of *Sarei* to read an exhaustion requirement

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95. *Id.* at 1062.

96. *Id.* at 1063.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* The plaintiff may rebut the defendant's showing of unexhausted remedies by demonstrating that the remedies in the foreign state are "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *Id.*

101. *Id.* at 1063-64.

> [P]rudential factors[] include[] but [are] not limited to: (1) the need to safeguard and respect the principles of international comity and sovereignty, (2) the existence or lack of a significant United States "nexus," (3) the nature of the allegations and the gravity of the potential violations of international law, and (4) whether the allegations implicate matters of "universal concern" for which a state has jurisdiction to adjudicate the claims without regard to territoriality or the nationality of the parties.

Id.

102. *Id.* at 1064 (Ikuta, J., dissenting).

103. *See id.* at 1070-71. Congress's intent can be found in § 1602 of the FSIA, which states in pertinent part: "'Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States *in conformity with the principles set forth in this chapter*.'" *Id.* at 1070 (quoting 28 U.S.C. § 1602 (2006)).

104. *See id.* at 1066.

into the FSIA.[105] For example, Judge Ikuta argued that the plurality opinion in *Sarei* was "not binding on subsequent panels."[106] Moreover, she stated, "even as persuasive authority," *Sarei* should not apply because its holding "is not on point."[107] Unlike in ATS cases where jurisdiction is found in civil actions for torts committed in violation of international law or a treaty of the United States,[108] the dissent pointed out that the FSIA only grants jurisdiction to a plaintiff that can show a nexus (commercial activity) with the United States.[109] Thus Judge Ikuta maintains that the *Sarei* court's concern about the potential for unlimited jurisdiction is not an issue in FSIA claims.[110] According to her, neither the language of the FSIA, nor congressional intent, nor Supreme Court dicta regarding the FSIA required the majority to read any type of exhaustion requirement into the statute.[111]

IV. ANALYSIS

The Ninth Circuit's decision in *Cassirer* initially opens the door for the adjudication of potential claims by victims of totalitarian regimes, such as Jews who lived in the Nazi era and who have seen their properties expropriated in violation of international law. The majority´s holding that the expropriation exception of the FSIA applies to a sovereign state regardless of who initially took the property in violation of international law is a promising first step toward the restitution of these properties to their original owners.[112] The court´s interpretation of the expropriation exception is consistent with the plain language of the statute and congressional intent to provide immunity to sovereign states only with regard to public or governmental acts, but not with respect to commercial or private acts.[113] Thus, once the foreign state or its agent is in possession of the expropriated property, the key issue that will determine whether a sovereign state is immune under the FSIA is whether that state or agent is engaged in "commercial activity" in the United States.[114]

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105. *Id.* at 1069.
106. *Id.*
107. *Id.* The *Sarei* court held that that "exhaustion is appropriate in cases 'where the United States "nexus" is weak' particularly 'with respect to claims that do not involve matters of universal concern.'" *Id.* (quoting Sarei v. Rio Tinto Ltd., 550 F.3d 822, 831 (9th Cir. 2008)).
108. 28 U.S.C. § 1350.
109. *Cassirer*, 580 F.3d at 1069.
110. *Id.*
111. *Id.* at 1068.
112. *Id.* at 1057 (majority opinion).
113. *Id.* at 1056-58.
114. *Id.* at 1057.

The Ninth Circuit expanded its already broad application of the expropriation exception when it held that the Foundation (as Spain's agent) was engaged in sufficient commercial activity to fall under that exception to immunity.[115] Ninth Circuit precedent supports this conclusion.[116] The court's analysis follows its most recent opinion in *Altmann*, which found that activities including "promoting[] and distributing books" in the United States that exploit expropriated paintings were enough to fulfill the commercial activity required by the FSIA.[117] The district court in *Cassirer* went further when it stated that "the commercial activity [does not have to] relate in any way to the illegally expropriated property."[118] Whether this is an appropriate reading of the commercial activity requirement remains to be seen. In the noted case, the Ninth Circuit ultimately concluded that the Foundation had engaged in commercial activity in the United States "of a kind in which a private party might engage"[119] and that such activity "was connected with the Painting."[120]

Finally, the Ninth Circuit's decision in *Cassirer* regarding the exhaustion of remedies requirement is a logical outgrowth of precedent stemming from its prior decision in *Sarei*, and yet at the same time, an analysis of congressional intent when enacting the FSIA reveals a lack of support for the majority's decision.[121] In finding that district courts should engage in prudential analysis before invoking an exhaustion of remedies requirement, the court stated that "where Congress has not

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115. *See id.* at 1059.

116. *See, e.g.*, Altmann v. Republic of Austria, 317 F.3d 954, 959 (9th Cir. 2002) (holding that promoting and distributing books in the United States were sufficient "commercial activities"); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 708-09 (9th Cir. 1992) (holding that advertising in the United States for a hotel located in Argentina, soliciting American guests, and hosting these guests at the hotel were sufficient evidence to satisfy the commercial activity requirement).

117. 317 F.3d at 959.

118. *See* Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1171 (C.D. Cal. 2006).

119. *Cassirer*, 580 F.3d at 1059 (quoting *Siderman de Blake*, 965 F.2d at 708).

120. *Id.* The Foundation engaged in such commercial activity as selling merchandise and advertising, as well as buying products and soliciting services in the United States. *Id.* at 1058-59.

121. The court followed its recent decision in *Sarei*, where exhaustion of remedies was required to be considered in claims brought under the Alien Tort Statute. *Id.* at 1062. However, the FSIA does not require exhaustion of remedies in a foreign country as a prerequisite to bring a claim in United States' courts. Although congressional intent regarding this issue is not clear, a plain reading of the statute, together with Congress's express inclusion of the expropriation exception in the FSIA favors a reading of this statute as not requiring exhaustion of remedies. As the dissent in *Cassirer* pointed out, "given that Congress chose not to include an exhaustion requirement in the FSIA, there appears to be little room for federal courts to impose a new, judge-made requirement on top of the statutory requirements already in the FSIA itself." *Id.* at 1067.

clearly required exhaustion, sound judicial discretion governs."[122] However, with the enactment of the FSIA, Congress intended to establish a "comprehensive jurisdictional scheme."[123] In addition, in the finding and declaration of purpose section of the FSIA, Congress stated that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the statute]."[124] Therefore, it is doubtful whether a requirement imposed on district courts to determine whether exhaustion of remedies is warranted under the circumstances of a particular case furthers Congressional intent. Such a requirement will arguably result in an inconsistent application of the statute with potentially disparate results[125]—just the type of outcome the statute was designed to prevent.

Furthermore, in reaching its decision, the Ninth Circuit struggled to reconcile Congress's power to confer subject matter jurisdiction on federal courts—power that emanates exclusively from Article III of the United States Constitution—and the limitations on jurisdiction that international legal principles purport to impose.[126] Although the *Cassirer* court found that imposing an absolute requirement to exhaust remedies in a foreign state before bringing suit under the FSIA will "usurp the Constitutional power vested in Congress," the court, nevertheless, concluded that "judicial discretion" should be exercised.[127] Consequently, the court took the opposite approach from that taken historically by the Supreme Court in expanding the application of the FSIA exceptions to immunity.[128] The Ninth Circuit's new approach narrows the potential application of the FSIA exceptions by implicitly requiring cautious plaintiffs to exhaust remedies in the foreign state, whenever available, before bringing suit in U.S. courts. As the dissent pointed out, "imposing a judge-made exhaustion requirement here . . . does nothing more than create a trap for the unwary."[129]

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122. *Id.* at 1059-60 (quoting McCarthy v. Madigan, 503 U.S. 140 (1992)).
123. Altmann v. Republic of Austria, 541 U.S. 677, 699 (2004).
124. 28 U.S.C. § 1602 (2006).
125. *See Cassirer*, 580 F.3d at 1070 (Ikuta, J., dissenting).
126. *Id.* at 1059-62 (majority opinion).
127. *Id.* at 1062.
128. *See generally Altmann*, 541 U.S. 677 (holding that the FSIA applies to conduct prior to its enactment); Argentine Republic v. Amerada Hess, 488 U.S. 428 (1989) (holding that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the United States); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480 (1983) (holding that the FSIA provides a court with both personal and subject-matter jurisdiction); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (declining to extend the Act of State Doctrine to purely commercial activities).
129. *Cassirer*, 580 F.3d at 1064 (Ikuta, J., dissenting).

While it seemed that the Ninth Circuit was opening the door for potential plaintiffs with claims related to expropriated property, it actually slammed it shut by requiring a prudential exhaustion of remedies analysis. The policy underlying this approach is based on core "principles of international comity and rules of customary international law."[130] Requiring exhaustion of remedies in the foreign forum will provide foreign states with the opportunity to redress any allegation of wrongdoing through their own legal systems. The Ninth Circuit's adoption of a prudential exhaustion analysis is consistent with justifications of immunity to foreign states, such as respect for the sovereignty of foreign nations and promotion of stable international relations among sovereign states. However, it might be more appropriate to leave the determination of imposing a prudential exhaustion of remedies analysis under the FSIA in the hands of the legislature rather than impose such a "judge-made exhaustion requirement" which threatens the uniform application of the statute.

V. CONCLUSION

The Ninth Circuit's decision in the noted case will have considerable repercussions in future claims brought under the FSIA. The framework set up by the Ninth Circuit is vague and could create confusion in its application. First, the court left too much leeway for district judges to impose or waive an exhaustion requirement. This discretion might lead to arbitrary application of the principles described in the framework and intended to be used in determining whether exhaustion of remedies is warranted. Second, it is not clear the extent to which the exhaustion defense could challenge subject matter jurisdiction or provoke a dismissal of the claim on forum non conveniens grounds. In any event, the exhaustion of remedies doctrine is an unnecessary defense that overlaps with other principles, such as the state of the act doctrine, the political question doctrine, or the forum non conveniens doctrine, which already aid foreign states (and private individuals) in having claims brought against them dismissed. Therefore, to require prudential exhaustion of remedies is to superimpose rules of customary international law on the FSIA at the expense of plaintiffs with legitimate claims that have lost their opportunity to be heard in the jurisdiction intended by Congress.

130. *Id.* at 1062 (majority opinion).

On December 30, 2009, the Ninth Circuit decided to rehear the case en banc.[131] At that time the court will have a second opportunity to address the exhaustion of remedies requirement under the FISA. Perhaps the court will adhere to the plain language of the statute this time, and follow congressional intent, rather than apply customary international requirements that are absent from the FISA.

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131. Cassirer v. Kingdom of Spain, 590 F.3d 981 (9th Cir. 2009).

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