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§ 1605(A)(3) IN THE LIGHT OF SNCF
HOLOCAUST WRONGDOING

Yanis Klumpp

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EXHAUSTION OF REMEDIES UNDER 28 USC § 1605(A)(3) IN THE LIGHT OF SNCF HOLOCAUST WRONGDOING

Yanis Klumpp*

ABSTRACT

In 2020, the United States Supreme Court granted certiorari on the question of whether a district court may abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act (“FSIA”) for reasons of international comity. Circuit court decisions are split on the question whether the FSIA’s expropriation exception under 28 USC § 1605(a)(3) requires that plaintiffs first exhaust local remedies provided in the relevant foreign country before filing suit in the United States. While the Seventh Circuit first argued for mandatory exhaustion in 2012 and retained its jurisprudence, the Ninth and the D.C. Circuit opposed the requirement of exhaustion. Concerning the Holocaust wrongdoing of the French National Railroad Company (“SNCF”), the Northern District of Illinois followed the Seventh Circuit’s holding—and relegated plaintiffs to France. Analyzing how the French Courts and institutions dealt and deal with the compensation claims related to SNCF illustrates the eroding effect of the exhaustion requirement on the FSIA expropriation exception. While the Paris Court of Appeal held a civil compensation claim time-barred, the highest French administrative court declared itself incompetent to hear claims against SNCF. Besides, France established the Commission pour l’indemnisation des victimes des spoliations (“CIVS”) to receive compensation claims. As foreign sovereign acts, the French judgments referred to above and the CIVS’s recommendations are recognized in the United States—precluding further court action. In addition, an exhaustion requirement within the FSIA expropriation exception might negatively impact investment protection.

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INTRODUCTION

It was surprising when the Seventh Circuit introduced an exhaustion requirement in the Foreign Sovereign Immunities Act's ("FSIA") expropriation exception under 28 USC § 1605(a)(3) in 2012.¹ In *Abelesz v. Magyar Nemzeti Bank*, Holocaust survivors and their heirs sued several Hungarian banks and the Hungarian National Railroad ("MÁV") for their Holocaust wrongdoing in 1944—which included expropriation.² The court held that plaintiffs must first exhaust local remedies in Hungary before claiming jurisdiction in the United States under the FSIA expropriation exception.³ For the plaintiffs, the Seventh Circuit's opinion was disappointing because they would have to fight a lawsuit in Hungary, the place of the wrongdoing—in a different language, in a different legal system, and dependent on foreign law firms.⁴ The question is whether the Seventh Circuit's position on exhaustion of local remedies is compatible with the FSIA expropriation exception under 28 USC § 1605(a)(3).

Today, circuits are split on the issue.⁵ While the Seventh Circuit upholds its *Abelesz* jurisprudence,⁶ the D.C. Circuit rejected introducing the exhaustion requirement.⁷ The Ninth Circuit had already held that 28 USC § 1605(a)(3) does not require exhaustion of remedies, relying on the plain language of the statute.⁸ And Justice Breyer's concurrence in *Republic of Austria v. Altmann*, suggested that a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.⁹ In July 2020, the United States Supreme Court granted certiorari concerning exhaustion of local remedies.¹⁰ However, in May 2021, the U.S. Supreme Court vacated and remanded *Simon* to be decided in light of the

¹ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 684 (7th Cir. 2012).

² *Id.* at 665, 666.

³ *Id.* at 666.

⁴ *See id.* at 684.

⁵ *See, e.g.,* *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015); *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), *vacated per curiam*, 141 S. Ct. 691 (2021).

⁶ *See Fischer*, 777 F.3d at 852.

⁷ *Simon*, 911 F.3d at 1181; *Philipp v. Fed. Republic of Germany*, 894 F.3d 406, 416 (D.C. Cir. 2018), *vacated*, 141 S. Ct. 703 (2021).

⁸ *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1034 (9th Cir. 2010).

⁹ *Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004).

¹⁰ *Republic of Hungary v. Simon*, 141 S. Ct. 187 (2020).

Court's decision in *Federal Republic of Germany v. Philipp*.¹¹ In vacating *Simon*, the Court did not address the key issue on the FSIA expropriation exception—the exhaustion requirement—leaving open the current circuit split between the D.C. and Seventh Circuits.

This Article will explain why the Supreme Court should resolve the circuit split by rejecting the exhaustion requirement—especially when considering how French courts and institutions dealt with Holocaust related claims against the French National Railroad (“SNCF”). These cases show how an exhaustion of remedies may deceive a plaintiff's hope for judicial rehabilitation for their suffering. Finally, this Article will show the importance of the FSIA expropriation exception as an alternative remedy concerning investment protection abroad, which should not be hindered by an additional exhaustion requirement.

I. THE (UNQUESTIONABLE) CONDITIONS OF THE FSIA EXPROPRIATION EXCEPTION

The FSIA gives immunity from suit to foreign sovereigns and their entities in the United States, unless one of the exceptions to immunity is satisfied.¹² The U.S. Supreme Court held in 2004 that the FSIA retroactively applies to facts prior to enactment in 1976,¹³ thus including Holocaust wrongdoing. That is why the FSIA expropriation exception gained central importance related to Holocaust wrongdoing.¹⁴

To lift foreign sovereign immunity under 28 USC § 1605(a)(3), four conditions must be satisfied.¹⁵ First, a taking must be perpetrated. A “taking” under the FSIA expropriation exception does not only refer to tangible objects but to all property.¹⁶ Second, it must be a public entity that perpetrates the taking.¹⁷ SNCF is now a public company and therefore enjoys immunity.

¹¹ *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021).

¹² 28 U.S.C. § 1604.

¹³ *Altmann*, 541 U.S. at 697.

¹⁴ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 678 (7th Cir. 2012).

¹⁵ *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000).

¹⁶ *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 480–81 (D.C. Cir. 2007).

¹⁷ *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003) (holding that, for FSIA purposes, the quality of the defendant at the time of the suit is decisive).

Third, the expropriation must take place in violation of international law.¹⁸ According to the U.S. Supreme Court and a 1976 U.S. House of Representatives report, an expropriation violates international law if it is perpetrated without payment of prompt and adequate compensation.¹⁹ With respect to SNCF and MÁV Holocaust wrongdoing, the plaintiffs claim that they did not receive any compensation until recently.²⁰ In *Scalin v. SNCF*, heirs of Holocaust survivors tried to be compensated for alleged expropriation of belongings on SNCF trains.²¹

Finally, there must be a commercial nexus to the United States for a taking to lift immunity.²² Plaintiffs must show that the property taken is owned or operated by the foreign sovereign or its entity in the United States.²³ The *Simon* court agreed with plaintiffs that an MÁV agency for ticket sales and booking in the United States is sufficient to satisfy the nexus requirement if the defendant does not dispute the allegations.²⁴ In case of SNCF Holocaust wrongdoing, a commercial nexus might be found in U.S. rail projects with Keolis,²⁵ a company in which the SNCF holds seventy percent of the shares.²⁶

II. EXHAUSTION REQUIREMENT IS FOREIGN TO THE FSIA EXPROPRIATION EXCEPTION

This Part will examine why the Seventh Circuit required exhaustion of remedies in *Abelesz* and *Fischer* and analyze whether a condition beyond the wording of 28 USC § 1605(a)(3) is justified.

¹⁸ *Zappia Middle E. Constr. Co.*, 215 F.3d at 251.

¹⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 429 (1964); H.R. REP. NO. 94-1487, at 19–20 (1976).

²⁰ *Scalin v. Société Nationale Des Chemins De fer Français*, No. 15-cv-03362, 2018 WL 1469015, at *1 (N.D. Ill. Mar. 26, 2018), *aff'd on other grounds*, 8 F.4th 509 (7th Cir. 2021); *Simon v. Republic of Hungary*, 911 F.3d 1172, 1175 (D.C. Cir. 2018), *vacated per curiam*, 141 S. Ct. 691 (2021).

²¹ *Scalin*, 2018 WL 1469015, at *1.

²² *Zappia Middle E. Constr. Co.*, 215 F.3d at 251.

²³ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 686 (7th Cir. 2012).

²⁴ *Simon v. Republic of Hungary*, 812 F.3d 127, 147 (D.C. Cir. 2016), *vacated per curiam*, 141 S. Ct. 691 (2021).

²⁵ *See Services*, KEOLIS NORTH AMERICA, <https://www.keolisnorthamerica.com/services/> [https://perma.cc/444B-6DN6].

²⁶ *See About Us*, KEOLIS, <https://www.keolis.com/en/our-group/keolis-provider-mobility-solutions/about-us> [https://perma.cc/DAU9-DH36].

Even the Seventh Circuit in *Abelesz* recognized that the wording of Section 1605(a)(3) does not require exhaustion.²⁷ However, the Seventh Circuit argued that exhaustion of remedies derives from the international law concept of comity.²⁸ To support its argument, the court refers to a case of the International Court of Justice and to the Restatement (Third) of the Foreign Relations Law of the United States, § 713 comment f.²⁹

Concerning the reach of comity, the Seventh Circuit's reasoning is not convincing because international law is secondary to national law and thus, cannot modify a domestic statute.³⁰ International law only has an effect in the absence of a treaty, a controlling legislative or executive act or a judicial decision.³¹ The U.S. Supreme Court held in *NML Capital* that the FSIA is a comprehensive statute regulating foreign sovereign immunity.³² Consequently, international comity cannot upgrade the FSIA by an exhaustion requirement.

Second, comity does not mandate a general requirement to exhaust local remedies. According to the U.S. Supreme Court, comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."³³ The Eleventh Circuit held that comity may have a prospective effect, allowing courts to consider "whether to dismiss or stay a domestic action based on the interests of [the U.S.] government, the foreign government and the international community."³⁴ However, courts must determine on a case-by-case basis whether to dismiss the action based on comity.³⁵ In contrast, the Seventh Circuit in *Abelesz* required the exhaustion of remedies, which is not covered by the concept of

²⁷ *Abelesz*, 692 F.3d at 678.

²⁸ *Id.* at 679.

²⁹ *Id.* at 679–80.

³⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

³¹ *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (quoting *The Paquete Habana*, 175 U.S. at 700).

³² *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014).

³³ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

³⁴ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

³⁵ *See id.*

comity. Moreover, the FSIA itself is an expression of comity with the principle of general immunity,³⁶ making comity considerations dispensable.

The Seventh Circuit was concerned that U.S. courts would interfere too deeply with foreign relations if they did not require exhaustion of remedies.³⁷ However, there are mechanisms, such as the political question doctrine, that allow courts to reject politically tense cases under certain circumstances.³⁸ For example, a court may abstain from adjudicating a dispute if its resolution might embarrass the state by contradicting pronouncements of other branches of government.³⁹ Related to SNCF Holocaust wrongdoing, U.S. courts have a good argument to reject claims based on the political question doctrine due to an agreement made between the United States and France in 2014.⁴⁰ The agreement's objective was to compensate certain Holocaust survivors, their spouses, and their assigns.⁴¹ France paid a total sum of \$60 million, which the United States agreed to distribute according to Article 6 of the agreement.⁴² In return, the French state and its entities benefit from legal peace in the United States.⁴³ According to Article 1.1, the agreement applies to any current or past agency of the French government, including SNCF.⁴⁴ Thus, U.S. courts would disturb the legal peace promised to France and its entities by dealing with SNCF expropriation claims, allowing them to reject these cases based on the political question doctrine. Therefore, the diplomatic concerns mentioned in *Abelesz* concerning SNCF Holocaust wrongdoing can be remediated without modifying the FSIA expropriation exception.

³⁶ 28 U.S.C. § 1604; *see also NML Cap., Ltd.*, 573 U.S. at 140.

³⁷ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679, 682 (7th Cir. 2012).

³⁸ *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1102–03 (C.D. Cal. 2013).

³⁹ *Baker*, 369 U.S. at 217.

⁴⁰ *Scalin v. Société Nationale Des Chemins De fer Français*, No. 15-cv-03362, 2018 WL 1469015, at *1 (N.D. Ill. Mar. 26, 2018), *aff'd on other grounds*, 8 F.4th 509 (7th Cir. 2021).

⁴¹ Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs, Fr.-U.S., art. 2.1, Dec. 8, 2014, 55 I.L.M. 341.

⁴² *Id.* art. 4.1.

⁴³ *Id.* arts. 2.2, 5.1–3.

⁴⁴ *Id.* art. 1.1.

Finally, the Seventh Circuit relies on the International Court of Justice (“ICJ”) case *Interhandel* to support the exhaustion requirement.⁴⁵ *Interhandel* was a case of diplomatic protection in which Switzerland was suing the United States.⁴⁶ In contrast, individuals are pressing claims against a foreign state in the context of French and Hungarian Holocaust wrongdoing, rendering *Interhandel* inapplicable.⁴⁷ For the same reason, the Seventh Circuit’s reliance on Restatement (Third) of the Foreign Relations Law of the United States § 713 is unconvincing.⁴⁸ Comment f of the Restatement also applies to claims between states.⁴⁹

Consequently, the Seventh Circuit’s reasoning for requiring exhaustion of remedies has no support in the wording of Section 1605(a)(3). Moreover, the international law concept of comity cannot modify the FSIA as comprehensive statute and does not mandate general deference to foreign courts. Furthermore, the FSIA itself is an expression of comity and other mechanisms such as the political question doctrine prevent U.S. courts from interfering too deeply with foreign relations. Finally, the Seventh Circuit’s arguments, resulting from the *Interhandel* case and the Restatement (Third) of Foreign Relations Law of the United States, § 713 comment f, are not convincing. Unfortunately, the Seventh Circuit’s approach is already being applied in the lower courts—the Northern District of Illinois recently followed its jurisprudence concerning SNCF Holocaust wrongdoing.⁵⁰

III. EXHAUSTION OF REMEDIES IN LIGHT OF FRENCH JURISPRUDENCE AND FRANCE’S TREATMENT OF HOLOCAUST-RELATED CLAIMS

Exhaustion of remedies as required by the Seventh Circuit in *Abelesz* protects foreign sovereigns and their entities more than planned by the FSIA expropriation

⁴⁵ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679–80 (7th Cir. 2012) (citing *Interhandel* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 26–27 (Mar. 21)).

⁴⁶ Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act’s Evolving Genocide Exception*, 23 UCLA J. INT’L L. & FOREIGN AFFS. 46, 70 (2019).

⁴⁷ *Id.* at 71.

⁴⁸ *See id.*

⁴⁹ *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 416 (D.C. Cir. 2018), *vacated*, 141 S. Ct. 703 (2021).

⁵⁰ *Scalin v. Société Nationale des Chemins de Fer Français*, No. 15-cv-03362, 2018 WL 1469015 at *8 (N.D. Ill. Mar. 26, 2018), *aff’d on other grounds*, 8 F.4th 509 (7th Cir. 2021) (applying the Seventh Circuit’s reasoning in *Abelesz* to SCNF Holocaust wrongdoing).

exception due to the *res judicata* effect of foreign judgements.⁵¹ *Res judicata* means that the same matter cannot be tried in front of a U.S. court unless the foreign judgment is procedurally or substantially defective.⁵² The downside of exhaustion, and its connection to *res judicata*, appears when analyzing how French courts dealt with claims related to SNCF Holocaust wrongdoing—plaintiffs would receive no judicial compensation.

A. *Civil Actions in France*

For example, the Paris Court of Appeal rejected an action of a Holocaust survivor as time-barred in 2004.⁵³ In *Schaechter*, the plaintiff sought compensation for the deportation of his parents by SNCF.⁵⁴ The court held that the thirty-year statute of limitations applied and thus, the plaintiff's claim was prescribed as of 1974.⁵⁵ The Court of Appeal stated that it was possible for the plaintiff to bring his claim before 1974 because SNCF's role in the deportation of Jews and so-called undesirables was described in publications appearing immediately after World War II.⁵⁶ Although the decision does not directly deal with expropriation, the thirty-year statute of limitation applies to any civil action, including those based on expropriation.⁵⁷ Thus, the reasoning in *Schaechter* can be transferred to expropriation claims in France.

There is a question as to whether the Paris Court of Appeal correctly set the starting point for the statute of limitations. The plaintiff claimed that he was unable to gather sufficient information concerning the fate of his parents until the *Bachelier*

⁵¹ *Simon v. Republic of Hungary*, 911 F.3d 1172, 1180 (D.C. Cir. 2018), *vacated per curiam*, 141 S. Ct. 691 (2021).

⁵² *See* *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895) (“[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction . . . and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of case should not . . . be tried afresh . . .”).

⁵³ *See* Cour d’appel [CA] [regional court of appeal] Paris, June 8, 2004, 2003/12747.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.*; *see also* *Christian Bachelier, La SNCF sous L’Occupation Allemande, 1940–1944* (1996) [hereinafter *Bachelier Report*] (detailing the role of the SNCF in the Holocaust commissioned by the SNCF).

⁵⁷ *See* Code civil [C. civ.] [Civil Code] art. 2262 (Fr.) (former Code, amended in 2008).

Report on SNCF Holocaust wrongdoing was published in 1996.⁵⁸ The Toulouse Administrative Court came to the same conclusion in *Liepietz*, holding that the plaintiffs were unable to sue the SNCF before getting access to scientific information on the railroad's role in deportation in the mid-1990s when the *Bachelier Report* appeared.⁵⁹ Furthermore, the publications referred to by the Paris Court of Appeal deal with SNCF's role in the Holocaust in general but might not contain specific information about the fate of the plaintiff's parents necessary to file a claim in court.⁶⁰ Finally, French President Jacques Chirac only recognized the French state's culpability and supporting role in the Holocaust in 1995.⁶¹ Thus, it was certainly difficult, if not impossible, for the plaintiff to obtain precise information before refurbishment of SNCF's past and the change of policy towards the Holocaust in France.

Concerning the *Schaechter* case, exhaustion of remedies, and the *res judicata* effect linked to it would result in recognizing the Paris Court of Appeal's judgement in the United States. Courts consider three factors to determine whether a foreign judgement is recognized and benefits from *res judicata*.⁶² They evaluate "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just."⁶³ There are no indications that the Paris Court of Appeal's opinion is procedurally or materially fraudulent, nor that it violates American public policy notions. The statute of limitations is a concept recognized in the United States and the French court is competent to set the starting point for prescription in accordance with French law. The Paris Court of Appeal's judgement can be doubted in this respect but is legally defensible.

⁵⁸ Cour d'appel [CA] [regional court of appeal] Paris, June 8, 2004, 2003/12747.

⁵⁹ Tribunaux administratifs [TA] [regional administrative courts of first instance] Toulouse, June 6, 2006, No. 0104248, 13 (Fr.).

⁶⁰ Cour d'appel [CA] [regional court of appeal] Paris, June 8, 2004, 2003/12747.

⁶¹ See Jacques Chirac, Président de la République, Pronouncement during the Ceremonies Commemorating the Great Roundup of July 16 and 17, 1942 (July 16, 1995), <https://www.fondationshoah.org/sites/default/files/2017-04/Allocution-J-Chirac-Vel-dhiv-1995.pdf> [<https://perma.cc/9WWA-JHY8>].

⁶² Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004).

⁶³ *Id.*

B. Administrative Actions in France

Comparable to civil proceedings, administrative actions concerning SNCF Holocaust wrongdoing were rejected by the highest French administrative court, the *Conseil d'État*, in 2007.⁶⁴ In *Liepitz*, the *Conseil d'État* declared itself incompetent to hear claims linked to SNCF Holocaust wrongdoing.⁶⁵ The court held that the SNCF was a private entity at the time of the wrongdoing and that SNCF agents did not exercise public powers because the deportation trains were guarded by German soldiers and French police.⁶⁶ The *Conseil d'État* decision was not undisputed. The first level of jurisdiction, overruled by the *Conseil d'État*, came to the opposite conclusion providing convincing arguments.

Relating to the *Conseil d'État*'s first argument, it can be questioned whether the SNCF was a private entity at the time of the wrongdoing. Indeed, a *décret-loi* of 1937 conferred the SNCF a private legal status.⁶⁷ However, the French State concluded a cease-fire agreement with the German occupier in 1940, putting the railway company de-facto at the disposal of the French Government and the German occupier.⁶⁸ Furthermore, the Toulouse Administrative Court held that the decree-law of 1937 does not apply to the deportation function of the SNCF, because the railroad acted beyond its mission of civil transportation on behalf of the French Government.⁶⁹ Accordingly, Article 13 of the cease-fire agreement superseded SNCF's private legal status, and SNCF's deportation function brings its legal status into question.

Moreover, the *Conseil d'État*'s second conclusion, that SNCF agents did not exercise public powers, is arguable. In France, the administrative judge exercises jurisdiction over so-called *Services Publics Administratifs* ("SPA"),⁷⁰ whereas civil

⁶⁴ Conseil d'État [CE] [highest administrative court], Dec. 21, 2007, No. 305966 (Fr.).

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ Décret-loi du 31 août 1937 portant réorganisation du régime des chemins de fer [Decree-Law of August 31, 1937 on the reorganization of the railway system] art. 2 (Fr.), <https://www.archives-historiques.sncf.fr/spark/pages/component/visionneuse.jsf?cptId=6931> [<https://perma.cc/AUA3-CRMV>].

⁶⁸ Convention d'armistice, Fr.-Ger., art. 13, June 22, 1940, <https://mjp.univ-perp.fr/france/1940armistice.htm> [<https://perma.cc/NG3X-J9JZ>].

⁶⁹ Tribunaux administratifs [TA] [regional administrative courts of first instance] Toulouse, June 6, 2006, No. 0104248, 10 (Fr.).

⁷⁰ ANTOINE BÉAL, JURISCLASSEUR PROCÉDURE CIVILE, Fasc. 400-45, No. 22 (2018).

courts possess jurisdiction over *Services Publics Industriels et Commerciales* (“SPIC”).⁷¹ To distinguish between an SPA and a SPIC, courts developed three criteria in the absence of an exact legislative or executive qualification.⁷² First, the very nature of the service is examined.⁷³ Second, the origin of the funding may help to classify the service.⁷⁴ Funding through contributions of the service’s users indicates that it is industrial and commercial—recognized as a SPIC—whereas an SPA is financed by tax subsidies, endowments, and subsidies.⁷⁵ Third, the legal structure of the entity may give a clue on the service’s qualification.⁷⁶

Concerning SNCF between 1940 and 1944, the criteria point to an SPA and, thus, the competence of the administrative judge. Part of SNCF’s task was to deport Jews and other so-called undesirables within France to Nazi extermination camps⁷⁷—which can hardly be qualified as an industrial and commercial service that can be exercised by a private entity. Second, SNCF charged the French Ministry of Interior for its deportation services.⁷⁸ Although SNCF drew revenue from civil transportation, the deportation of Jews and other so-called undesirables was financed publicly.⁷⁹ Furthermore, the private revenues of a SPIC are paid voluntarily by the people using the service, which is not the case for deportees on SNCF trains.⁸⁰ Finally, as already mentioned above, the private legal status of SNCF can be doubted due to Article 13 of the cease-fire agreement between the German occupier and France. Thus, the object of the service, the origin of the funding, and the structure of

⁷¹ Conseil d’État [CE] [highest administrative court], Dec. 21, 2007, No. 305966 (Fr.).

⁷² Conseil d’État [CE] [highest administrative court], « Union syndicale des industries aéronautiques », Nov. 16, 1956, 26549, Rec. CE 434 (Fr.).

⁷³ Trib. conflits, Jan. 22, 1921, Les Grands Arrêts de la Jurisprudence Administrative (arrêt Bac d’Eloka).

⁷⁴ Conseil d’État [CE] [highest administrative court], « Union syndicale des industries aéronautiques », Nov. 16, 1956, 26549, Rec. CE 434 (Fr.).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Tribunaux administratifs [TA] [regional administrative courts of first instance] Toulouse, June 6, 2006, No. 0104248, 10 (Fr.); *Scalin v. Société Nationale des Chemins de Fer Français*, No. 15-cv-03362, 2018 WL 1469015 at *1 (N.D. Ill. Mar. 26, 2018).

⁷⁸ Tribunaux administratifs [TA] [regional administrative courts of first instance] Toulouse, June 6, 2006, No. 0104248, 10 (Fr.).

⁷⁹ *Id.*

⁸⁰ *Id.*

SNCF point to a *Service Public Administratif* and the competence of the administrative judge.

Besides the three criteria identified above, French courts require three additional conditions for a private entity to exercise a public administrative service.⁸¹ The entity must fulfill (1) an administrative task through (2) express delegation of (3) public powers by law or decree.⁸²

Regarding the first condition, SNCF supported the Vichy administration and the German occupier in managing the deportation of Jews and other so-called undesirables, which is an administrative task. Concerning the second criterion, the *Conseil d'Etat* held that SNCF lacked public powers because the deportation trains were guarded by German soldiers or French policemen.⁸³ However, there is evidence that SNCF agents were involved in the planning of the trains, the creation of a transportation schedule, and the sealing of the coaches.⁸⁴ Finally, there might not be an express delegation of public powers, but SNCF received orders from the French Ministry of Interior to deport a certain number of people, which can be interpreted as delegation to execute an administrative task on behalf of the French state.⁸⁵

Although the criteria of a SPA might not entirely fit into SNCF Holocaust wrongdoing, it is more appropriate to qualify SNCF's deportation function as *Service Public Administratif*. Thus, there is a good argument that the administrative judge is competent to hear claims concerning SNCF Holocaust wrongdoing, including expropriations.

Like the judgement of the Paris Court of Appeal in the *Schaechter* case, the *Conseil d'Etat*'s opinion in *Lipietz* has a *res judicata* effect in the United States and precludes plaintiffs from bringing a claim in the same matter. Although arguable, the *Conseil d'Etat*'s opinion is legally defensible due to the ambiguous qualification of SNCF at the time of the wrongdoing. Thus, there is no reason for a United States court to refuse recognition of the *Conseil d'Etat*'s opinion.

⁸¹ BEAL, *supra* note 70, at No. 75; Conseil d'État [CE] [highest administrative court], « Bougouen », Apr. 2, 1943, No. 72210 (Fr.).

⁸² *Id.* at No. 77; Conseil d'État [CE] [highest administrative court], « Bougouen », Apr. 2, 1943, No. 72210 (Fr.).

⁸³ Conseil d'État [CE] (high-administrative court), Dec. 21, 2007, No. 305966; Cour administrative d'Appel [CAA], Bordeaux, Mar. 27, 2007, No. 06BX01570.

⁸⁴ TA Toulouse, June 6, 2006, No. 0104248; CHRISTIAN BACHELIER, *THE SNCF UNDER GERMAN OCCUPATION 1940–1944*, at 16 (1996).

⁸⁵ TA Toulouse, June 6, 2006, 0104248; BACHELIER, *supra* note 84, at 15.

The judgements of the Paris Court of Appeal and the *Conseil d'État* show that an exhaustion requirement confers a surplus of protection to SNCF due to the *res judicata* effect and the high bar to overcome recognition of foreign judgements. Mandatory exhaustion of local remedies would have the same effect in any expropriation claim brought in the United States against a foreign sovereign or its entity. In the case of SNCF Holocaust wrongdoing, U.S. courts would have to accept that victims failed in receiving compensation from French courts.

C. *The Commission pour l'Indemnisation des Victimes des Spoliations* ("CIVS")

In 1999, the French Government established the *Commission pour l'Indemnisation des Victimes des Spoliations* ("CIVS")—charged with receiving compensation claims against the French state and its institutions related to their Holocaust wrongdoing.⁸⁶ Thus, France offers an additional executive remedy that plaintiffs can turn to and that they must exhaust.⁸⁷

Relating to SNCF Holocaust wrongdoing, plaintiffs in *Scalin v. SNCF* argued that the CIVS is not competent to receive SNCF claims, drawing upon the fact that the CIVS had not heard any compensation claim relating to SNCF Holocaust wrongdoing until then.⁸⁸ In contrast, SNCF submitted a declaration of the CIVS's chairman, Michel Jeannoutot, who asserted that the commission accepts claims against the National Railroad.⁸⁹ Indeed, a recent CIVS recommendation shows that the commission dealt with a petition for alleged SNCF takings.⁹⁰

⁸⁶ Décret 99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation [Decree 99-778 of September 10, 1999 on Establishing a Commission for the Compensation of Victims of Spoliations Arising From the Anti-Semitic Laws in Force During the Occupation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 10, 1999, p. 1.

⁸⁷ *Scalin v. SNCF*, No. 15-cv-03362, 2018 WL 1469015 at *8 (N.D. Ill. Mar. 26, 2018), *aff'd on other grounds*, 8 F.4th 509 (7th Cir. 2021) (The Seventh Circuit affirmed the district court's decision, but on different grounds. The Seventh Circuit held that section 1605(a)(3) did not provide a substantive claim in a "triple-foreign suit," in which foreign plaintiffs were injured by a foreign entity in a foreign nation. In dicta, the Seventh Circuit said it would have affirmed the district court's decision had the plaintiffs articulated a substantive claim.).

⁸⁸ *Id.* at *5.

⁸⁹ *Id.*

⁹⁰ See Requête 11972 du 3 juillet 2020 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation (on file with author).

The CIVS compensation procedure is similar to a judicial proceeding—for example retired judges research the facts concerning the case, the commission can hear witnesses, and the plaintiff may be assisted by counsel and may request an appeal by the full CIVS panel.⁹¹ The commission gives a compensation recommendation to the *Secrétariat Général du Gouvernement* (Office of the French Prime Minister), which the Prime Minister approves or rejects.⁹² Consequently, the compensation decision is ultimately made by a representative of the French Government.

The plaintiffs in *Scalin* tried to establish that the CIVS is a sham or inadequate as a remedy and raised the commission's structural problems like its lack of judicial powers, authority, and transparency in awarding damages.⁹³ Eric Freedman, an academic who represented over a thousand plaintiffs, criticized the CIVS recommendations, saying that they are not always equitable and the indemnification provided is not always adequate.⁹⁴ The plaintiffs' concerns of opacity and lengthy procedure were confirmed by the Paris administrative court in *Fraenkel*.⁹⁵ The court notes that the CIVS is not a jurisdiction under the European Convention of Human Rights and, thus, not bound to the rule of a speedy procedure, which negatively affects the interests of some of the plaintiffs given their age.⁹⁶ Moreover, the CIVS is not required to give full access to research documents,⁹⁷ underlining the plaintiffs' claim of opacity. Despite these concerns, the Northern District of Illinois held in *Scalin v. SNCF* that the CIVS is not clearly a sham or inadequate as remedy.⁹⁸

⁹¹ *Scalin*, 2018 WL 1469015, at *4.

⁹² Décret 99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation [Decree 99-778 of September 10, 1999, on Establishing a Commission for the Compensation of Victims of Spoliations Arising From the Anti-Semitic Laws in Force During the Occupation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 10, 1999, p. 4.

⁹³ *Scalin*, 2018 WL 1469015, at *5.

⁹⁴ *Id.* at *5, *6.

⁹⁵ TA Paris, June 8, 2007, No. 0507913/7.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Scalin*, 2018 WL 1469015, at *8.

There is no immediate judicial review of the CIVS recommendations.⁹⁹ That is why the internal re-examination procedure of petitions was introduced in 2001.¹⁰⁰ An indirect way to scrutinize the CIVS recommendations is to attack the French Prime Minister's approval thereof in front of the administrative judge.¹⁰¹ However, administrative courts usually grant the administration room for discretion.¹⁰² Thus, the Prime Minister's refusal of a compensation award must suffer from a clear error of judgment to be overturned by the administrative judge,¹⁰³ narrowing the scope of judicial review.

As the Supreme Court held in *Hilton*, comity includes the recognition of foreign executive acts.¹⁰⁴ Consequently, U.S. courts would have to recognize the CIVS's recommendations and the French Prime Minister's approval thereof in the absence of fraud or violation of public policy notions.¹⁰⁵ Moreover, despite concerns about the CIVS compensation procedure, it is difficult for plaintiffs to establish that the commission is clearly a sham or inadequate as a remedy. Therefore, exhaustion and the recognition of foreign executive acts linked to it heavily weaken the FSIA expropriation exception. Concerning SNCF Holocaust wrongdoing, the FSIA expropriation exception entirely loses significance because claims are dealt with by the CIVS and the French Prime Minister.

IV. POTENTIALLY WEAKENING EFFECT OF AN EXHAUSTION REQUIREMENT—INVESTMENT CLAIMS

Besides claims related to SNCF Holocaust wrongdoing, an exhaustion requirement might have a weakening effect on investment claims. The FSIA expropriation exception is an alternative remedy for U.S. investors next to settlements based on bilateral investment treaties ("BIT") or the International Center

⁹⁹ See, e.g., Conseil d'État [CE] [highest administrative court], July 23, 2012, 348105.

¹⁰⁰ See Décret 99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation [Decree 99-778 of September 10, 1999 on Establishing a Commission for the Compensation of Victims of Spoliations Arising From the Anti-Semitic Laws in Force During the Occupation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 10, 1999, p. 4.

¹⁰¹ TA Paris, June 8, 2007, No. 0507913/7.

¹⁰² *Id.* at 4, 5.

¹⁰³ *Id.*

¹⁰⁴ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

¹⁰⁵ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

for the Settlement of Investment Disputes (“ICSID”) Convention with the advantage that U.S. courts are familiar with the claims.

Foreign investments may be protected by BITs. These treaties are concluded between two states and aim to facilitate mutual trade and investment.¹⁰⁶ They define the investments protected¹⁰⁷ and often confer jurisdiction to the ICSID to settle disputes.¹⁰⁸ Usually, they contain an expropriation clause making direct or indirect expropriations unlawful unless certain conditions are satisfied.¹⁰⁹ Article 6(1) of the BIT between the United States and Rwanda requires that a taking must satisfy (1) a public purpose; (2) be non-discriminatory; (3) provide prompt, adequate, and effective compensation; and (4) be in accordance with a due process of law.¹¹⁰ Thus, the investment treaty assumes a taking to be illegal unless certain conditions are satisfied, which puts the burden of proof upon the state. Under Section 1605(a)(3), the investor must establish the taking to be in violation of international law and the commercial nexus. Consequently, obtaining compensation for expropriations under a bilateral investment treaty is more advantageous for the investor than establishing the FSIA expropriation exception. However, the United States has only concluded few BITs.¹¹¹ That is why U.S. investors need additional ways to protect their foreign investments from expropriation.

Additionally, a settlement by the ICSID, which is a widely accepted institution, may be an alternative to BITs.¹¹² If there is no BIT or if the treaty is silent on expropriations, the ICSID may refer to international law principles, including the compensation standard for unlawful takings.¹¹³ However, in the context of increasing

¹⁰⁶ Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., preamble, Feb. 19, 2008, 2008 U.S.T. LEXIS 197.

¹⁰⁷ *See, e.g., id.* art. 1.

¹⁰⁸ *See, e.g., id.* art. 24(a)(3).

¹⁰⁹ *See, e.g., id.* art. 6(1).

¹¹⁰ *Id.*

¹¹¹ Jide Nzelibe, *The Breakdown of International Treaties*, 93 NOTRE DAME L. REV. 1173, 1203 (2018).

¹¹² *Database of ICSID Member States*, INT’L CTR. FOR SETTLEMENT OF INV. DISPS., <https://icsid.worldbank.org/about/member-states/database-of-member-states> [<https://perma.cc/YH5C-B77Y>].

¹¹³ *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (1997) (Buergenthal & Trooboff, Arbs.).

skepticism towards the ICSID,¹¹⁴ the FSIA expropriation exception might be a convenient ultimate remedy for American investors to defend takings of their investments abroad. For example, Venezuela withdrew from the ICSID convention.¹¹⁵ In the absence of a bilateral investment treaty with Venezuela, U.S. investors have an interest in being able to defend takings via the FSIA expropriation exception. For example, in *Helmerich & Payne Drilling Co.*, a U.S. parent company unsuccessfully sought compensation for the seizure of its Venezuelan subsidiary's assets of by the military under the FSIA expropriation exception.¹¹⁶ Other countries, including Bolivia and Ecuador also withdrew from the ICSID convention¹¹⁷ and terminated their BITs with the United States.¹¹⁸

The FSIA expropriation exception might gain significance as alternative remedy or last resort for U.S. investors, especially in the absence of BITs or if the ICSID convention does not apply. However, exhaustion of local remedies protracts an FSIA expropriation suit or puts the burden of proof on the investor to establish that local remedies are clearly a sham or inadequate. Thus, exhaustion hinders U.S. investors from referring to the FSIA expropriation exception.

CONCLUSION

The exhaustion requirement is not found in the text of the FSIA. And the D.C. and Seventh Circuits are currently split on the finding of whether plaintiffs must first exhaust local remedies provided in the relevant foreign country before filing suit in the United States. This Article outlines the argument that the U.S. Supreme Court should resolve the current circuit split by rejecting exhaustion as a requirement of the FSIA expropriation exception. It shows the effect of exhaustion related to SNCF Holocaust wrongdoing. And explains how French courts and institutions dealt with these claims and depicted—without wanting to discredit the *Commission pour l'indemnisation des victimes des spoliations*—that an exhaustion requirement bars victims of SNCF Holocaust wrongdoing from obtaining judicial recognition and rehabilitation for their suffering which is often more important to victims than monetary compensation and executive action. Additionally, the FSIA expropriation

¹¹⁴ Nzelibe, *supra* note 111, at 1206.

¹¹⁵ *Id.* at 1207.

¹¹⁶ *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317, 1319 (2017).

¹¹⁷ Nzelibe, *supra* note 111, at 1206.

¹¹⁸ *United States Bilateral Investment Treaties*, U.S. DEP'T OF STATE, <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/> [<https://perma.cc/T6PS-TNKL>].

exception is an important alternate remedy in areas such as investment claims, especially with growing skepticism towards the Convention and BITS. It should not be introduced by the Supreme Court as an upgrade to the expropriation exception.

