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A SEPARATION OF POWERS ANALYSIS OF *FORUM NON CONVENIENS*' ADEQUATE AVAILABLE FORUM

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> The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the president, subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.[1]
>
> – *Alexander Hamilton*

INTRODUCTION

"Boehner snubs [White House], invites Netanyahu to address Congress."[2] These words, or words remarkably similar, headlined newspapers all around the United States on January 21, 2015.[3] Without consulting President Obama, House Speaker John Boehner invited Israeli Prime Minister Benyamin Netanyahu to address a joint session of Congress in opposition to the White House's overtures to Iran with respect to its nuclear program.[4]

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[1] ALEXANDER HAMILTON, PACIFICUS NO. 1 (June 29, 1793), *reprinted in* 7 THE WORKS OF ALEXANDER HAMILTON 76, 81 (John C. Hamilton ed., 1851).

[2] Susan Davis, *Boehner Snubs WH, Invites Netanyahu To Address Congress*, USA TODAY (Jan. 22, 2015, 7:09 AM), http://usat.ly/1JeZq5d [https://perma.cc/XY92-2TZ5].

[3] *See*, *e.g.*, *id.*

[4] *Id.* Speaker Boehner, in a statement regarding the invitation, stated, "I am asking the prime minister to address Congress on the grave threats radical Islam and Iran pose to our security and way of life." *See* Jake Miller, *Boehner Invites Benjamin Netanyahu To Address Congress*, CBS NEWS (Jan. 21, 2015, 4:40 PM), https://www.cbsnews.com/news/john-boehner-invites-israeli-prime-minister-benjamin-netanyahu-to-address-congress/ [https://perma.cc/BD57-W8LJ].

Speaker Boehner extended the invitation in apparent response to President Obama's State of the Union Address, in which he informed Congress that any further economic sanctions bill against Iran at that time would be detrimental to ongoing diplomatic negotiations and would be vetoed.[5] Prime Minister Netanyahu accepted the offer and addressed a joint session of Congress.[6]

Questions were immediately raised about the unprecedented breach of diplomatic protocol, as invitations to foreign leaders to address Congress are usually made in consultation with the White House and State Department.[7] Some went so far as to question whether the invitation was unconstitutional.[8] According to Article II, Section 3, of the United States Constitution, the President of the United States "shall receive Ambassadors and other public Ministers" from foreign governments.[9] Critics of the invitation argued that Prime Minister Netanyahu, appearing as the official representative of his country, should be classified as a "public minister." According to Stanford University Professor Jack Rakove, the Founding Fathers empowered the President with this role for a specific reason—to facilitate negotiations with foreign powers regarding complex issues on behalf of the United States.[10] In this regard, while Congress is tasked with declaring war,[11] "the [P]resident is charged with making peace—and 'peace [was] attended with intricate and secret negotiations.' "[12] This decision, enshrined in the Constitution, demonstrated the Founding Fathers' desire to have the President in charge of "delicate" negotiations with foreign governments that required discretion.[13] While Boehner's invitation to Netanyahu did not precipitate a constitutional crisis, it did raise the question of which branch of

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[5] Miller, *supra* note 4.

[6] *The Complete Transcript of Netanyahu's Address to Congress*, WASH. POST (Mar. 3, 2015, 12:01 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/03/03/full-text-netanyahus-address-to-congress/ [https://perma.cc/Q36F-5ZAN].

[7] *See* Davis, *supra* note 2.

[8] *See, e.g.*, Elizabeth Cobbs, *Why Boehner's Invite to Netanyahu Is Unconstitutional*, REUTERS (Mar. 2, 2015), http://blogs.reuters.com/great-debate/2015/03/01/netanyahu-invite-is-a-symptom-of-boehners-grudge-match-against-the-u-s-constitution/ [https://perma.cc/LK4B-B2AV].

[9] U.S. CONST. art. II, § 3.

[10] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 267 (1996) ("Familiar as the [F]ramers were with these episodes, they could readily appreciate the diplomatic and political advantages of allowing the [P]resident a significant initiative in the conduct of foreign relations.").

[11] U.S. CONST. art. I, § 8, cl. 11.

[12] Cobbs, *supra* note 8 (alteration in original).

[13] *Id.*

government, the executive or the legislative, should control this important aspect of foreign policy.[14]

Discussions of the separation of powers principle often focus on the relationship and power struggle between the executive and legislative branches of the United States federal government as evidenced by the dichotomous power struggle over the Netanyahu invitation. Some separation of powers arguments target over-reaching by a zealous Executive whom the legislative branch wants to reign in and control. Or they involve a strong and dominant Congress that overrides and ignores a perceived weaker President. At other times, separation of powers discussions may focus on how the judiciary and the Executive interact and decide issues that touch upon foreign policy or political questions. Harold Koh, the former Legal Adviser at the United States Department of State, in discussing separation of powers doctrine, stated that "the Founding Fathers framed the constitutional provisions on foreign affairs with two goals in mind—to fashion a stronger national government while holding each branch of that government accountable to the others through a strong system of checks and balances."[15]

In evaluating the role of separation of powers, the Executive is often perceived as having significant independent power in the area of foreign relations, while courts have a limited role in matters that implicate foreign affairs. But from where exactly does the Executive's foreign affairs power derive? Some argue this foreign affairs power arises from the inherent concepts of nationality and sovereignty under international law. Others argue that the Executive's foreign affairs powers derive either explicitly or implicitly from Article II of the United States Constitution. While the Constitution is actually silent on the exact role of the Executive with regard to the international arena, Koh opined that when evaluating the role of the Executive

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[14] Likewise, in March 2015, Senator Tom Cotton and forty-six other Republican members of Congress wrote an "open letter" to the leaders of the Islamic Republic of Iran with the intent of advising them regarding United States constitutional law relating to international agreement making. Press Release, Tom Cotton, Senator, State of Arkansas, Cotton and 46 Fellow Senators to Send Open Letter to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), https://www.cotton.senate.gov/?p=press_release&id=120 [https://perma.cc/FM96-FHGX]. This letter was an undisguised attempt to undercut the Obama administration's ability to negotiate regarding nuclear disarmament with the Iranian government, and thus was an unprecedented attack on the Executive's power to negotiate with foreign nations.

[15] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 74–75 (1990).

with respect to foreign affairs, one should look to a "normative vision of the foreign policy-making process" that "lurks within our constitutional system."[16] While the Executive should not have unbridled control over foreign affairs, great deference and respect should be accorded to the political aspects surrounding foreign policy determinations. While no foreign affairs clause exists in the Constitution, executive powers derived from the Constitution include "the important foreign affairs powers encompassing a nation's relationship with those outside it—principally, diplomatic and military powers."[17] Further, according to Professor Michael Ramsey, a textual basis in the Constitution exists for the Executive's foreign affairs powers.[18] Article II, Section 1, of the Constitution states that the President has the "executive Power" of the United States.[19] While this clause might not seem to discuss foreign affairs, Professor Ramsey states, "it was associated with foreign affairs in eighteenth-century uses of the term."[20] With this understanding of Article II, Section 1, in mind, limits were designed regarding the President's "executive Power." Checks and balances were developed to moderate these powers. Even so, despite the checks and balances achieved through separation of powers as understood from the Constitution, courts are not "in charge of foreign affairs" and should not "undertake foreign affairs policymaking."[21] These principles should have important implications for how the courts are addressing *forum non conveniens* analyses, especially with respect to adequate alternative forum.

Forum non conveniens, a common law doctrine, was initially developed to protect foreign defendants from being forced to litigate claims in forums that were unreasonable, despite the preference to allow plaintiffs the right to choose where and how to litigate their claims. The Supreme Court of the United States gave weight to the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*,[22] which it further clarified in *Piper Aircraft Co. v. Reyno*.[23] The *forum non conveniens* doctrine, as established by the Supreme Court in *Gulf Oil Corp.*, developed as a preventive

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[16] *Id.* at 68.
[17] MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 5 (2007).
[18] *Id.* at 52.
[19] U.S. CONST. art. II, § 1, cl. 1.
[20] RAMSEY, *supra* note 17, at 52 (emphasis omitted).
[21] *Id.* at 7.
[22] 330 U.S. 501, 508–09 (1947).
[23] 454 U.S. 235, 248–50, 257 (1981).

to plaintiffs' choosing a forum designed solely to harass a defendant, and was expanded in *Piper Aircraft* to prevent forum shopping by foreign plaintiffs who wished to litigate in United States courts.[24] While the Supreme Court recognized that deference may be accorded to domestic plaintiffs and their choice of forum, less deference was given to foreign plaintiffs suing in a United States court.[25] Yet, even before this determination is made, the federal court is required to assess whether an adequate alternative forum exists in which the plaintiff may bring suit.

Thus, the first question a court must address in any *forum non conveniens* analysis is how to determine if an alternate forum is available to a plaintiff that justifies granting a motion to dismiss based on *forum non conveniens*. By mandating that an alternative forum be adequate, the Supreme Court implicitly recognized that a *forum non conveniens* dismissal may not prevent the plaintiffs from having their day in court. The Supreme Court in *Piper Aircraft*, however, fashioned a rather incomplete test for the lower courts with regard to an adequate alternative forum by stating that a forum is ordinarily available when "the defendant is 'amenable to process' in the other jurisdiction."[26] The Court then obfuscated the point by following up with the statement that this rule was not absolute:

> [W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.[27]

Unfortunately for plaintiffs attempting to invoke *forum non conveniens*, the Supreme Court, in its limited analysis of adequate available forum, failed to distinguish between an inadequate forum and an inadequate remedy. Does this gap in the analysis mean that an inadequate remedy makes the forum inadequate? Or is it inadequate only when there is no remedy at all? Or when the litigation cannot occur at all? Further, the Supreme Court failed to address other factors that might impact the adequacy of the alternative forum, such as the lack of sufficient procedural process or the fundamental fairness of the court system in the

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[24] *Gulf Oil Corp.*, 330 U.S. at 507; *Piper Aircraft Co.*, 454 U.S. at 251–52.
[25] *Piper Aircraft Co.*, 454 U.S. at 255–56.
[26] *Id.* at 254 n.22.
[27] *Id.*

other forum. The result of the Supreme Court's vague policy position has been that lower courts and commentators have applied a variety of methods and tests to evaluate the adequacy of an available forum.

According to Joel Samuels in his article, "When Is an Alternative Forum Available? Rethinking the *Forum Non Conveniens* Analysis," a new test is required to decide how and when judges should apply the alternate available forum determination.[28] In his article, Samuels proceeds to lay out a six-factor test for the judiciary to use in its evaluation of whether the alternate forum is truly available.[29] In order to qualify as an alternative forum, Samuels suggests looking at the alternative forum with respect to "jurisdiction, meaningful remedy, fair treatment of parties, access to the courts, procedural due process, and stability of the forum."[30] However, Samuels' argument, while cogent and correct, does not go far enough. While his factors test provides additional resources for the decision on an available forum, the wrong entity is interpreting those factors. The judiciary is not the optimal branch for reviewing whether an alternative available forum exists.

While not taking a position on whether these factors represent the universe of potentiality with respect to qualifications for an alternate available forum, this Article advocates that the executive branch is uniquely positioned to review these factors and provide an opinion to the courts on whether the alternate forum is indeed an adequate one. Before reaching this discussion, Part I of this Article introduces *forum non conveniens* through the Supreme Court's rulings in *Gulf Oil Corp. v. Gilbert*[31] and *Piper Aircraft Co. v. Reyno*.[32] Once the foundations for *forum non conveniens* are established, Part II of this Article turns to a survey of cases that have been decided on the basis of whether an adequate available forum existed or not. At the core of the Article's analysis of adequate available forum, Part III specifically analyzes lower court decisions assessing the adequacy of an alternative forum by categorizing these decisions either as ones that focus on the alternative forum's judicial capacity or upon

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[28] Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the* Forum Non Conveniens *Analysis*, 85 IND. L.J. 1059, 1081 (2010).

[29] *Id.* at 1061.

[30] *Id.* at 1081.

[31] 330 U.S. 501 (1947).

[32] 454 U.S. 235 (1981).

factors that impact international relations and how these categorizations implicate separation of powers. Part IV of the Article then explains the separation of powers doctrine through original understanding, historical practice, and constitutional structure. Finally, Part V demonstrates why, from a separation of powers perspective, courts should defer to the Executive in determining an adequate alternative forum when the case implicates international relations.

I. "IN THE BEGINNING"—THE DEVELOPMENT OF *FORUM NON CONVENIENS*

The Supreme Court in *Gulf Oil v. Gilbert* made its first foray into developing a federal standard for *forum non conveniens* by adopting a doctrine intended solely to prevent plaintiffs from choosing a forum for the exclusive purpose of harassing the defendant.[33] The Court stated that the plaintiff was not allowed to choose a forum that would " 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to [the plaintiff's] own right to pursue his remedy."[34]

The parties in *Gulf Oil* were both United States citizens, and the jurisprudence as set forth by the Supreme Court was designed to prevent what the Court perceived as injustice to the defendant. The plaintiff in *Gulf Oil* operated a warehouse in Lynchburg, Virginia, where he lived.[35] The defendant, Gulf Oil, a Pennsylvania corporation, qualified to do business in both Virginia and New York, was alleged to have negligently delivered a shipment of gasoline to the plaintiff's warehouse and its pumps.[36] This shipment exploded and destroyed the plaintiff's warehouse.[37] Plaintiff initiated his lawsuit in the United States District Court for the Southern District of New York, and the defendant moved to dismiss the action to Virginia based on the doctrine of *forum non conveniens*.[38] The Southern District of New York agreed with the defendant and dismissed the case to Virginia.[39] The United States Court of Appeals for the Second

[33] 330 U.S. at 507–09.
[34] *Id.* at 508.
[35] *Id.* at 502.
[36] *Id.* at 502–03.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 503.

Circuit disagreed and reversed.[40] The Supreme Court agreed with the district court's order granting the *forum non conveniens* request transferring the case from New York to Virginia.[41]

In reaching its conclusion, the Supreme Court based its determination on a careful balancing of both private and public interest factors. Private interest factors weighed by the court included

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[42]

The court may also account for the "enforcibility [sic] of a judgment" and the "relative advantages and obstacles to fair trial."[43] Public interest factors that the court will balance are "[a]dministrative difficulties" that arise from "congested" court dockets, "[j]ury duty" for individuals who do not have any "relation to the litigation," "local interest[s] in having controversies decided" in the home forum, and questions of which law will govern.[44] Prior to weighing the private and public factors, the court explained that unless the "balance is strongly in favor of the defendant," the plaintiff's choice of forum should be given great deference.[45] Additionally, the Court implicitly assumed the adequacy of the alternative forum by stating that a *forum non conveniens* analysis "presupposes at least two forums in which the defendant is amenable to process."[46] In *Gulf Oil*, the alternate available forum was either a state or federal court in Virginia, where the defendant was amenable to process; as a result the Supreme Court did not engage in an analysis of this issue.[47]

As both forums in *Gulf Oil* were in the United States, the Supreme Court simply assumed the adequacy of either forum.[48] One year later, judicial application of *forum non conveniens* with re-

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[40] *Id.*
[41] *Id.* at 512.
[42] *Id.* at 508.
[43] *Id.*
[44] *Id.* at 508–09.
[45] *Id.* at 508.
[46] *Id.* at 507.
[47] *Id.* at 503.
[48] *Id.* at 506–07.

spect to dismissal from one federal court to another federal court became a non-issue with the enactment of 28 U.S.C. § 1404(a), which allowed cases to be transferred from one federal district to another, provided that both forums had proper jurisdiction and venue.[49] Since this statute involved the transfer of a case from one district court to another, by virtue of its application, it was unnecessary to address whether the transferee court was an adequate available forum. It was not until thirty-four years later that the Supreme Court addressed the issue of the adequacy of an available forum with respect to dismissal to a foreign court in *Piper Aircraft Co. v. Reyno*.[50]

In *Piper Aircraft*, the Supreme Court elucidated the modern application of *forum non conveniens* that courts are still applying today. *Piper Aircraft* involved a wrongful death action that arose from an airplane crash in Scotland that resulted in the death of several Scottish citizens.[51] Reyno, the legal secretary of the attorney representing the plaintiffs who was appointed the representative of the Scottish decedents' estates, filed wrongful death litigation on behalf of the five decedents in California state court.[52] The defendants, Piper Aircraft Co. and Hartzell Propeller, Inc., were a Pennsylvania company that manufactured the plane and an Ohio company that manufactured the plane's propellers.[53] When the crash occurred, the plane was registered in Great Britain and was owned and operated by United Kingdom companies.[54] The defendants successfully removed the action to the United States District Court for the Central District of California and then, utilizing 28 U.S.C. § 1404(a), transferred the case to the United States District Court for the Middle District of Pennsylvania.[55] After transferring to the Middle District of Pennsylvania, the defendants argued that the case should be dismissed to Scotland on the grounds of *forum non conveniens*.[56] Applying the private and public factors expounded in *Gulf Oil Co. v. Gilbert*, the district court granted the motion to dismiss.[57] The United States Court of Appeals for the Third Circuit re-

[49] 28 U.S.C. § 1404(a) (2018).
[50] 454 U.S. 235, 238 (1981).
[51] *Id.* at 238–40.
[52] *Id.* at 239–40.
[53] *Id.* at 239.
[54] *Id.*
[55] *Id.* at 240.
[56] *Id.* at 241.
[57] *Id.*

versed the district court based partly on its analysis of adequacy of Scotland as an alternative forum.[58] Specifically, the Third Circuit determined that Scotland would not be an adequate forum because the law of the transferee forum would be less favorable to the plaintiff.[59]

The Supreme Court reversed the court of appeals and granted dismissal based on *forum non conveniens*.[60] In reaching its decision, the Court "shifted and enlarged the *Gilbert* standard from simply preventing vexation or harassment to also include preventing forum shopping."[61] While the Court agreed that the first step in a *forum non conveniens* analysis was whether an adequate available forum existed, it took issue with the Third Circuit's formulation of the adequacy test. The Court stated:

> The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.[62]

The Court, however, then placed a caveat on its decision by indicating that unfavorable substantive law may be a relevant consideration, stating that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight."[63]

According to the *Piper* Court, an alternative forum is deemed available as long as the defendant is "amenable to [service of] process," except in "rare circumstances" when "the remedy offered by the other forum is clearly unsatisfactory."[64] While the possible damages that plaintiffs could recover in Scotland was far less than what was available in the United States, this difference did not render Scotland an inadequate forum.[65] Less favorable

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[58] *Id.* at 244–45.

[59] *Id.* at 244.

[60] *Id.* at 247, 261.

[61] Megan Walpes, Note, *The Adequate Alternative Forum Analysis in* Forum Non Conveniens*: A Case for Reform*, 36 CONN. L. REV. 1475, 1482 (2004).

[62] *Piper Aircraft Co.*, 454 U.S. at 247.

[63] *Id.* at 254.

[64] *Id.* at 254 n.22.

[65] *Id.* at 254–55.

did not mean less adequate. The Supreme Court's formulation of adequacy of an available forum, however, failed to distinguish between an inadequate forum and an inadequate remedy. Rather, the Court seems to imply that the one equates with the other.

> [W]here the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter in dispute.[66]

This approach is quite dissatisfying. It equates a question of law that is suited to determination by the courts, that is, whether the remedy is adequate, with a question of foreign policy, that is, whether the very forum itself is adequate—a question that implicates executive power and is best left in the hands of the Executive to decide. Further, in reaching its decision, the Court failed to directly address "procedural safeguards, practical considerations, or concerns regarding the fundamental fairness of the court."[67] The Supreme Court's failure to address these critical components regarding an adequate available forum has allowed federal courts to take inconsistent and divergent positions on what constitutes an adequate foreign forum, how to appropriately address the actual procedural and practical weaknesses in dismissing cases to foreign forums, and how to address the competency or impartiality of a foreign court. Lower courts that have attempted to answer these questions in their adequate available forum analyses have focused their analyses on either the forum's inherent judicial ability or upon international relations and foreign policy considerations—a dichotomy that implicates and begs for a separation of powers analysis. In order to further explicate this point, representative lower courts' discussions of adequate available forums will now be explained and analyzed.

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[66] *Id.* at 254 n.22. Once the Supreme Court determined that an adequate available forum existed, it then decided that "a foreign plaintiff's choice [of forum] deserves less deference" than the deference provided to United States plaintiffs who are litigating in federal courts. *Id.* at 256. The Court then reviewed the private interests and the public interests as set forth originally in *Gilbert*, holding that the balance of interests favored the defendants, and dismissed the case to Scotland. *Id.* at 257.

[67] Walpes, *supra* note 61, at 1484.

II. LITTLE RHYME OR REASON—FEDERAL COURTS AND ADEQUATE AVAILABLE FORUM ANALYSES

Analyzing *forum non conveniens* with respect to a determination of an adequate available forum presents several challenges, not the least of which is the lack of reported decisions. Additionally, according to Joel Samuels, who reviewed 1,447 *forum non conveniens* cases for his 2010 article, courts conducted adequate available forum analyses in only 999 of those cases—which is sixty-nine percent—even though, according to the dictates of *Piper Aircraft*, such an analysis should be required in one hundred percent of the cases.[68] Further, based on the *Piper Aircraft* decision, some courts have viewed the determination on the adequacy of the available forum as a low threshold.[69] With these points in mind, this Section will review *forum non conveniens* cases, not to be a comprehensive analysis of the topic, but rather to demonstrate the difficulties and inconsistencies involved in federal courts attempting to apply a standard for adequate available forum.

Many courts simply bypass the adequate available forum analysis by assuming or merely stating that the forum is "adequate" without any analysis of the issue whatsoever. For instance, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court decided that Canada was an adequate forum to determine plaintiffs' claims of genocide, specifically stating that it "assume[d], without deciding, that plaintiffs would be able to receive a fair trial in Canada, notwithstanding the fact that Talisman is a Canadian company."[70] Instead of requiring the defendant to demonstrate that Canada was an adequate forum, the court relied on the fact that the plaintiffs failed to challenge the adequacy of Canada as an adequate available forum, which effectively shifted the burden of proof on this issue to the plaintiffs.[71] Likewise, in *State Street Bank & Trust Co. v. Inversiones Errazuriz, Limitada*, the plaintiffs sought recovery of "over $100 million pursuant to

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[68] Samuels, *supra* note 28, at 1077.

[69] *See, e.g.*, Princeton Football Partners LLC v. Football Ass'n of Ir., No. 11-5227, 2012 WL 2995199, at *4 (D.N.J. Jul. 23, 2012) (citing Tech. Dev. Co. v. Onischenko, 174 F. App'x 117, 120 (3d Cir. 2006) ("Inadequacy of the alternative forum is rarely a barrier to *forum non conveniens* dismissal.")).

[70] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 336–37 (S.D.N.Y. 2003), *aff'd*, 582 F.3d 244 (2d Cir. 2009).

[71] *Id.* at 337–38*; see also, e.g.*, Int'l Equity Invs., Inc. v. Cico, 427 F. Supp. 2d 503, 505 (S.D.N.Y. 2006) (stating that "the Court assumes that Brazil provides an adequate alternative forum").

two Credit Agreements."[72] After settlement talks failed and the plaintiff filed and received a default judgment, the defendants appeared to challenge the default judgment and to assert defenses, including *forum non conveniens*.[73] In reviewing the *forum non conveniens* claim, the court recognized that the inquiry was a two-step process, with the "first step" being "to determine if an adequate available forum exists."[74] However, the court failed to engage in such an analysis, but rather, relied on the fact that the "plaintiff [did] not challenge the adequacy of the alternative forum in Chile," which abrogated its responsibility to engage in a rigorous analysis of this critical first step in a *forum non conveniens* analysis.[75] Conversely, in *Technology Development Co. v. Onischenko*, the Third Circuit reversed the district court, stating that a more exacting analysis of adequate available forum is necessary prior to dismissal.[76] "[T]he District Court should have done more than simply conclude that Russia provides an adequate forum without any discussion whatsoever of the remedies available in Russia or any citation to cases supporting the view that the Russian courts are adequate to handle disputes of this nature."[77]

When federal courts provide any analysis of *forum non conveniens*, without any explicit guidance from the Supreme Court, they often focus on myriad factors. Some courts will look to the defendant's amenability to process in the other forum, and, provided that this requirement is met, will find that the alternative forum is adequate. A corollary to this position is to consider certain procedural issues within the analysis of adequate available forum. These procedural safeguards, when analyzed, often will not render a foreign forum inadequate. Some courts in their adequate available forum analyses look at the "soundness and procedural fairness of that society's court system."[78] In *Flynn v. General Motors, Inc.*, the defendant asserted that Trinidad and

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[72] State St. Bank & Tr. Co. v. Inversiones Errazuriz, Limitada, 230 F. Supp. 2d 313, 315 (S.D.N.Y. 2002).

[73] *Id.* at 315–16, 319.

[74] *Id.* at 319.

[75] *Id.*; *see also, e.g.*, DR Music, Inc. v. Aramini Strumenti Musicali S.R.L., No. 13-7028, 2014 WL 523042, at *4 (D.N.J. Feb. 7, 2014) (finding that "it appears that there is an alternative forum, *i.e.* the Italian courts" because the defendant indicated that it was amenable to process in Italy).

[76] Tech. Dev. Co. v. Onischenko, 174 F. App'x 117, 120 (3d Cir. 2006).

[77] *Id.*

[78] Flynn v. Gen. Motors, Inc., 141 F.R.D. 5, 8 (E.D.N.Y 1992) (quoting Murty v. Aga Khan, 92 F.R.D. 478, 482 (E.D.N.Y. 1981)).

Tobago was an adequate forum as its court system would allow the plaintiff an opportunity to be heard and could provide a remedy for the injuries suffered due to the defective products.[79] The plaintiffs conversely argued that Trinidad and Tobago was an inadequate forum, relying on the position that Trinidad and Tobago's court system did not "provide jury trials in civil cases."[80] The court determined Trinidad and Tobago was an adequate forum as "Plaintiff ha[d] failed to show that the Trinidad and Tobago judicial system lack[ed] appropriate procedural safeguards."[81] Absent procedural inadequacies, the court held that "principles of comity preclude[d] characterizing the judicial system of Trinidad and Tobago as any less fair than our own."[82]

Other procedural shortcomings likewise have not prevented federal courts from finding that the forum was an adequate alternative. Neither restrictions on discovery nor denial of oral cross-examinations have led courts to decide that a foreign forum was inadequate. In *Aguinda v. Texaco, Inc.*,[83] Ecuador was found to be an adequate available forum despite plaintiffs' arguments that Ecuadorian tort law was insufficiently developed and that class actions were unavailable in Ecuador.[84] Plaintiffs also argued that procedural deficiencies, including protracted administrative proceedings prior to suit, "restrictions on discovery," limitations on cross-examination, and limitations on experts, existed that rendered Ecuador an inadequate forum.[85] The court found each of these rationales for an inadequate forum unpersuasive.[86] Likewise, in *In re Union Carbide Corp. Gas Plant Disaster* (*Bhopal Litigation*), the plaintiffs raised several

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[79] *Id.* at 8.

[80] *Id.* at 9.

[81] *Id.*; *see also, e.g.*, *Murty*, 92 F.R.D at 482 ("Where the traditions and powers of a foreign judiciary are uncertain an American court should not dismiss a case 'without resort to a comparison of alternative procedural safeguards.' " (quoting Phoenix Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455 (D. Del. 1978), *aff'd in part, rev'd in part*, 842 F.2d 1466 (3d Cir. 1988))).

[82] *Flynn*, 141 F.R.D. at 9 (quoting *Murty*, 92 F.R.D at 482) (finding that "[p]rinciples of comity as well as common knowledge preclude our characterizing the French judicial system as any less fair than our own").

[83] 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002).

[84] *Id.* at 539–42.

[85] *Id.* at 542–43.

[86] *Id.* at 539–43. The *Aguinda* court also addressed that Ecuador was an unsatisfactory alternative forum based on the claim that the Ecuadorian judiciary was corrupt. *Id.* at 543. This argument is addressed below. *See infra* text accompanying notes 107–178.

procedural and practical issues with respect to India as an adequate forum, including the underdevelopment and "lack of sophistication [of] Indian tort law," the court system's inability to manage complex tort litigation, limitations on the availability of discovery, and the unavailability of class action devices and "contingent fee arrangements."[87] The court reviewed each of these arguments and determined that the "courts of India appear to be well up to the task of handling this case."[88]

By contrast, the Fifth Circuit does not focus on procedural practicalities in its adequate available forum analysis, but rather focuses on whether the parties will have some form of legal remedy in the foreign forum and will be treated fairly. For instance, in *Baumgart v. Fairchild Aircraft Corp.*, the court reviewed whether German courts could provide an adequate available forum for an action on behalf of German citizens who died in an airplane crash in Germany.[89] The court found that the German civil code allowed for jurisdiction in the German courts.[90] The court held that "[a] foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum."[91] Further, "[a] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court."[92]

The Fifth Circuit took this analysis to its ultimate and logical conclusion in *Delgado v. Shell Oil Co.*, when the United States District Court for the Southern District of Texas consolidated several suits filed in Texas regarding the use of the pesticide that contained the chemical dibromochloropropane—DBCP.[93] The pesticide, manufactured by Dow Chemical and Shell Oil, had been banned from use in the United States due to claims of "sterility, testicular atrophy, miscarriages, liver damage, cancer and other ailments,"[94] but was still distributed for use in

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[87] 634 F. Supp. 842, 848–53 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

[88] *Id.* at 852.

[89] 981 F.2d 824, 827 (5th Cir. 1993).

[90] *Id.* at 835.

[91] *Id.* (quoting *In re* Air Crash Disaster, 821 F.2d 1147, 1165 (5th Cir. 1987)).

[92] *Id.* (quoting *In re* Air Crash Disaster, 821 F.2d at 1165).

[93] 890 F. Supp. 1324, 1335 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000).

[94] Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001), *aff'd in part, cert. dismissed in part,* 538 U.S. 468 (2003).

developing nations, including "Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, the Philippines, Saint Lucia, and Saint Vincent."[95]

After addressing myriad procedural issues, the district court turned to the *forum non conveniens* analysis and tackled the question of adequate available forum. The court started its inquiry by stating that "[a] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits as they might receive in an American court."[96] The plaintiffs raised numerous substantive and procedural deficiencies, including the lack of contingent fee arrangements, vastly lower monetary awards, lack of civil juries, inability to recover for non-economic losses and punitive damages, restrictions on witnesses and the ability to testify, and discovery limitations.[97] The court ruled that these concerns were not relevant to the analysis of adequate available forum, but rather weighed into the analysis of the litigants' private interests.[98] Based on this standard, the court found that all twelve forums were adequate based primarily on affidavits of the parties' expert witnesses who advised on the ability to recover for injuries under the various forums' legal regimes.[99] The court, however, failed to address critical issues such as the judicial system's independence, reliability, or ability in each foreign country. Likewise, in *DeSirey v. Unique Vacations*, the court engaged in little to no analysis of critical factors that should encompass the adequate available forum. In determining whether St. Lucia was an adequate forum for a negligence claim, the District Court of the Eastern District of Missouri instead relied on the assurances of the defendant's expert witness, an attorney from the foreign forum, that the forum was adequate to hear the tort claim and on judicial precedent that St. Lucia provided an adequate forum.[100]

The Eleventh Circuit, however, recognized the inherent conflict in courts' engaging in an adequate available forum analysis with respect to a foreign forum judicial system's

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[95] *Delgado*, 890 F. Supp. at 1337 (footnote omitted).

[96] *Id.* at 1356 (quoting *In re* Air Crash Disaster*,* 821 F.2d at 1165).

[97] *Id.* at 1357 n.79.

[98] *Id.* at 1365.

[99] *Id.* at 1335, 1358–65, 1369, 1371.

[100] DeSirey v. Unique Vacations, Inc., No. 4:13 CV 881 RWS, 2014 WL 272369, at *2 (E.D. Mo. Jan. 24, 2014).

independence, reliability, and ability. In *Esfeld v. Costa Crociere, S.P.A.*, the court rightly noted that "foreign relations are implicated in the *forum non conveniens* calculus," thus "federal courts necessarily must analyze the interest that the foreign country has in the dispute, an analysis that may raise issues of international comity."[101] In this regard, while courts require defendants to demonstrate that the forum offer some remedy, courts "have not always required that defendants do much to refute allegations of partiality and inefficiency in the alternative forum."[102] In fact, the Second Circuit has stated that "considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards."[103]

Expert witness testimony is often relied upon in assessing the adequacy of a foreign forum. In *Leon v. Millon Air, Inc.*, Ecuadorian citizens filed suit in the United States District Court for the Southern District of Florida to recover for fatalities suffered by Ecuadorian residents resulting from an airline crash in Ecuador.[104] Affidavits were filed by both American and Ecuadorian lawyers affirming the adequacy of the Ecuadorian judicial system.[105] Plaintiffs contested this assertion, alleging the Ecuadorian legal system was "in turmoil and had been recently shut down by a strike of the judges."[106]

The court began its adequate alternative forum analysis by articulating that "[a]vailability and adequacy warrant separate consideration."[107] A forum is available when jurisdiction may be asserted over the litigation, that is, when the defendant is "amenable to process" in the foreign jurisdiction.[108] A forum is adequate when the defendant has demonstrated that "the alternative forum offers at least some relief."[109] However, while "[a]n adequate forum need not be a perfect forum," the Eleventh Circuit did note

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[101] 289 F.3d 1300, 1312 (11th Cir. 2002).

[102] Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001).

[103] PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998).

[104] 251 F.3d at 1308.

[105] *Id.* at 1309.

[106] *Id.*

[107] *Id.* at 1311 (citing Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 (11th Cir. 2001)).

[108] *Id.* (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981)).

[109] *Id.* For example, the First Circuit reversed a *forum non conveniens* dismissal when the defendant did not prove that claims for breach of contract and tortious interference with contract were recognized causes of action under Turkish law. Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 425 (1st Cir. 1991).

that "extreme amounts of partiality or inefficiency may render the alternative forum inadequate."[110] In making this determination, the court held that the defendants had "the ultimate burden of persuasion" on the issue, but only after the plaintiffs had sufficiently substantiated the allegations of inefficiency, delay, or corruption.[111] In analyzing the efficiency and impartiality of the Ecuadorian courts, the court determined—without any concerns about comity or hesitancy about the impact on foreign relations—that the plaintiff had failed to sufficiently demonstrate that the Ecuadorian court could neither reasonably nor expeditiously adjudicate the wrongful death claims presented in the litigation, and thus Ecuador presented an adequate forum for the litigation.[112]

An outlier in the adequate available forum analysis and one that definitively demonstrates the confusion caused by the Supreme Court's lack of guidance is the Eighth Circuit's opinion in *Reid-Walen v. Hansen*, where the court seemed to conflate the issue of adequacy with the private factors of convenience of the parties.[113] The district court had dismissed the case under *forum non conveniens* in favor of the foreign forum of Jamaica.[114] The Eighth Circuit disagreed and reversed the district court, primarily based on the fact that the district court failed to assess the plaintiff's ability to litigate in Jamaica.[115] The court was specifically cognizant of "the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternative forum."[116] The Eighth Circuit, in reversing the district court, took into consideration that "trying the case in Jamaica was so infeasible, both practically and financially, that Reid-Walen would not pursue the matter if unable to litigate in her chosen forum . . . . In this case, the

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[110] *Leon*, 251 F.3d at 1311–12. Excessive delays in the litigation may make the forum so inefficient as to render it an inadequate forum. *See, e.g.*, Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1228 (3d Cir. 1995) (finding that the Indian court was an inefficient and hence inadequate forum when delays of up to twenty-five years were possible).

[111] *Leon*, 251 F.3d at 1312.

[112] *Id.* at 1314.

[113] 933 F.2d 1390, 1401 (8th Cir. 1991).

[114] Reid-Walen v. Hansen, 715 F. Supp. 270, 272 (E.D. Mo. 1989), *rev'd*, 933 F.2d 1390 (8th Cir. 1991).

[115] *Reid-Walen*, 933 F.2d at 1401.

[116] *Id.* at 1398 (quoting Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 346 (8th Cir. 1983)).

'alternative forum' is really not much of a forum at all."[117] Thus, this decision demonstrates how federal courts have struggled with addressing the procedural and practical problems that encompass the alternative available forum analysis.

In addition to reviewing procedural and practical difficulties in an adequate alternative forum analysis, the courts often are called upon to address the adequacy of a foreign forum based on allegations of corruption, disorder, and poorly developed jurisprudence. While these issues are often affirmatively raised, the courts have seldom ruled in plaintiffs' favor, instead relying on international comity to find that "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."[118]

In 1997, in *Eastman Kodak Co. v. Kavlin*, the United States District Court for the Southern District of Florida established the high standard that subsequent courts have emulated in evaluating whether a court should invalidate the adequacy of a foreign forum on the basis of corruption.[119] In *Kavlin*, the defendant Casa Kavlin was a Bolivian distributor for Kodak, distributing goods such as "photographic laboratory equipment, films, graphic arts materials, x-ray materials, and microfilm."[120] After a period of time, Kodak decided it was not satisfied with its relationship with Casa Kavlin and sent a representative to survey the Bolivian market.[121] Shortly thereafter, Kodak informed Casa Kavlin that it was terminating its relationship and the representative sent by Kodak "would be responsible for Kodak sales, supplies distribution, and representation in Bolivia."[122] Casa Kavlin then filed a written criminal complaint against the Kodak representative that included "falsifying documents, espionage against Casa Kavlin, [and] stealing Casa Kavlin's clients."[123] These allegations resulted in the issuance of an arrest warrant, the representative's appearance before a judge that was the godfather of the child of Casa Kavlin's attorney, and the representative's eventual incarceration in a rat-infested prison alongside murderers and drug dealers for eight days,

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[117] *Id.* at 1399.

[118] Chesley v. Union Carbide Corp., 927 F.2d 60, 66 (2d Cir. 1991) (quoting Jhirad v. Ferrandina, 536 F.2d 478, 484–85 (2d Cir. 1976)).

[119] Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084–85 (S.D. Fla. 1997).

[120] *Id.* at 1080.

[121] *Id.*

[122] *Id.*

[123] *Id.*

which he survived only by "buy[ing] the right to live in a jail cell for $5,000."[124] Casa Kavlin also arranged for the attorney of Kodak's representative and two other Kodak employees to be charged as criminal co-conspirators.[125] All four individuals were subsequently convicted by the Bolivian court in absentia and each sentenced to five years in prison.[126]

Casa Kavlin then brought civil suit against Kodak in Bolivia, in which it sought $10 million in damages.[127] Kodak, in turn, sued Casa Kavlin in the United States District Court for the Southern District of Florida, alleging various causes of actions under Bolivian law "including extortion, false accusation and denunciation, exercise of monopoly of work, and a declaratory judgment that Casa Kavlin is not entitled to the relief it seeks in its Bolivian complaint."[128] Kodak's representative also sued Casa Kavlin claiming that its actions in having him jailed in order to extort Kodak violated "the law of nations."[129] The defendant moved to dismiss the complaint filed in United States federal court on grounds that included lack of personal jurisdiction and *forum non conveniens*.[130]

With respect to the *forum non conveniens* argument, the "[p]laintiffs essentially argue[d] that the Courts of Bolivia are so corrupt and slow as to make fair and timely resolution of their claims highly unlikely."[131] The district court began its analysis of whether an adequate available forum existed by noting the argument that "[t]he 'alternative forum is too corrupt to be adequate' . . . [and] does not enjoy a particularly impressive track record."[132] In fact, the court specifically noted that it was unable to locate any published opinion that adopted the position that a forum was inadequate due to corruption in the judicial system.[133]

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[124] *Id.* at 1080–81. Casa Kavlin allegedly attempted to extort Kodak in exchange for dropping the charges against its representative. *Id.*

[125] *Id.* at 1081.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 1081–82.

[129] *Id.* at 1082.

[130] *Id.*

[131] *Id.* at 1084.

[132] *Id.*

[133] *Id.* However, the court noted a number of jurisdictions where this particular argument had been specifically rejected. *Id.*; *see* Blanco v. Banco Indus. de Venez., S.A., 997 F.2d 974, 981–82 (2d Cir. 1993) (determining that Venezuela was not an inadequate forum even though plaintiff presented evidence of corruption when the parties named Venezuela the chosen forum through a forum selection clause); Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1351 (1st Cir. 1992) (concluding that

Since Kodak had transacted business in Bolivia for seventy years, the court reasoned that absent a compelling counterargument, "having made its bed in Bolivia, Kodak should lie there too."[134] Yet, the court found that the overwhelming evidence presented by the plaintiffs, including comments by the Bolivian Minister of Justice,[135] noted legal scholars,[136] Bolivian government officials,[137] and official United States government reports,[138] provided ample justification to doubt the adequacy of Bolivia as an alternative forum. While the defendants "vigorously" disputed that they manipulated the Bolivian judicial system and that corruption was not as rampant as alleged by the plaintiff, the court ultimately concluded that defendants did not meet the "burden of proving the existence of an adequate available forum," and thus the court denied the motion to dismiss on the grounds of *forum non conveniens*.[139]

Turkey was an adequate forum even though plaintiff alleged that Turkish judiciary had a " 'profound bias' against Americans and foreign women"); Torres v. S. Peru Copper Corp., 965 F. Supp. 899, 903 (S.D. Tex. 1996) (holding that Peru was not an inadequate available forum as insufficient evidence was provided to demonstrate that Peruvian courts were corrupt), *aff'd*, 113 F.3d 540 (5th Cir. 1997); Banco Mercantil, S.A. v. Hernandez Arencibia, 927 F. Supp. 565, 567–68 (D.P.R. 1996) (rejecting the argument that Dominican Republic courts were "so . . . corrupt as to . . . provide an [in]adequate available forum").

[134] *Kavlin*, 978 F. Supp. at 1085.

[135] According to the court, "[a] Bolivian newspaper article published September 20, 1996, quotes the Minister of Justice as saying that 'the current judicial system is a collection agency and the penal system is an agent of extorsion [sic].' " *Id.* at 1085.

[136] Professor Keith S. Rosenn of the University of Miami Law School, based on World Bank and State Department reports, cited widespread corruption in the Bolivian courts. *Id.* Professor Eduardo A. Gamarra of Florida International University stated "bribery of judges, attorneys, and even Supreme Court justices [was] a routine practice. . . . Bribery range[d] from relatively small to extremely high amounts. . . . In 1991, eight members of the Supreme Court were charged with acts of corruption." *Id.* (second alteration in original).

[137] Luis Peñarana, a Bolivian lawyer who was the legal counsel to the Bolivian House of Representatives judicial oversight commission, stated " '[c]orruption [was] endemic to the judicial system of Bolivia,' existing 'at all levels of the system.' " *Id.* (first alteration in original).

[138] The State Department Country Report on Human Rights Practices for 1995 submitted to the United States Senate Committee on Foreign Relations and the House Committee on International Relations stated "[t]he justice system . . . is overburdened, afflicted by the corruption of some judges, and lacking public credibility. . . . Judges are underpaid, poorly disciplined, and susceptible to political influence. . . . [M]ajor political parties influence the judicial selection process and decisions in particular cases." *Id.* at 1086 (second and third alterations in original).

[139] *Id.* at 1086–87.

As noted by the *Kavlin* court itself, this case is an anomaly in the universe of adequate available forum cases.[140] In 2006, the Ninth Circuit was called upon to address the allegations of corruption in the Philippine courts as the basis to deny a *forum non conveniens* motion. In *Tuazon v. R.J. Reynolds Tobacco Co.,* the plaintiff, Tuazon, smoked Salem cigarettes for more than forty years, was eventually diagnosed with chronic obstructive pulmonary disorder in his native country of the Philippines, and subsequently moved to the state of Washington.[141] Tuazon sued R.J. Reynolds in the United States District Court for the Western District of Washington, alleging that Reynolds engaged in an effort to "suppress information regarding the addictive and health-related effects of cigarettes."[142] After finding that the district court had properly asserted personal jurisdiction over the case, the Ninth Circuit had to address Reynolds' motion to dismiss based on *forum non conveniens*, starting with plaintiff's claims that the Philippines failed to provide an adequate available forum since the "Philippine courts [were] too corrupt and plagued with delays."[143] Unlike the significant evidentiary support presented in *Kavlin*, Tuazon relied "on his own experience as a lawyer and businessman in the Philippines" and upon State Department reports that detailed "corruption, judicial bias[,] and inefficiency" in the Philippine court system, but which were primarily "focused on human rights in the Philippines, and the criminal justice system."[144] While the Ninth Circuit recognized that a forum may be inadequate if the "legal system [was] so fraught with corruption, delay[,] and bias as to provide 'no remedy at all,' " the evidence offered by the plaintiff did not overcome R.J. Reynolds' arguments that the Philippines was an adequate available forum.[145]

Likewise, Peru was determined to be an adequate available forum in *Carijano v. Occidental Petroleum Corp.* despite allegations of widespread discrimination and corruption in the

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[140] *Id.* at 1087.

[141] 433 F.3d 1163, 1167 (9th Cir. 2006).

[142] *Id.* at 1168.

[143] *Id.* at 1177–78.

[144] *Id.* at 1178–79.

[145] *Id.* at 1179. While the Ninth Circuit therefore determined that the district court's finding of inadequacy of the Philippines forum was not supported, it ultimately upheld the district court's denial of R.J. Reynolds' *forum non conveniens* motion based on a balancing of the private and public factors that weighed in favor of retaining the litigation in the United States. *Id.* at 1179–80, 1181.

Peruvian judicial system.[146] According to the complaint filed in *Carijano*, Occidental knowingly "discharge[d] millions of gallons of toxic oil byproducts" into the rivers of the northern Peruvian rainforest.[147] The Achuar, an indigenous people who lived in the Peruvian rainforest, used these polluted rivers for "drinking, washing, and fishing," which allegedly resulted in, among other things, "gastrointestinal problems, kidney trouble, [and] skin rashes."[148] The Achuar asserted claims "for common law negligence, strict liability, battery, medical monitoring, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, and intentional infliction of emotional distress, as well as a violation of California's Unfair Competition Law."[149] Occidental moved to dismiss the case on the grounds of *forum non conveniens*, which the district court granted based on Peru being an adequate alternative forum and the balancing of private and public factors favoring trial in Peru.[150]

On appeal, the Ninth Circuit reviewed whether Peru was an adequate available forum. After determining that Occidental was amenable to service of process in Peru, which established its adequacy as a forum, the court reviewed whether Peruvian courts offered the Achuar a "satisfactory remedy."[151] While the parties offered conflicting expert testimony, the plaintiffs argued that general corruption existed in the Peruvian judicial system that prevented the Achuar from receiving a satisfactory remedy.[152] Specifically, plaintiffs' experts testified to "unique barriers confronting the Achuar Plaintiffs in Peru due to their ethnicity, poverty, and isolation" and that the court system contributed to ongoing discrimination against the Achuar.[153] Plaintiffs' expert asserted that the Peruvian judiciary suffered from " 'institutionalized' corruption, including widespread lobbying of judges, third party informal 'intermediaries' between magistrates and parties, and the exchange of improper favors and information."[154] In contrast, the expert for Occidental testified that the Peruvian judiciary had become more reliable in

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[146] 643 F.3d 1216, 1222–23, 1226 (9th Cir. 2011).
[147] *Id.* at 1222.
[148] *Id.* at 1222–23.
[149] *Id.* at 1223.
[150] *Id.*
[151] *Id.* at 1225.
[152] *Id.*
[153] *Id.* at 1226.
[154] *Id.*

recent years.[155] In particular, he noted that the Peruvian government was fighting corruption including "the removal and sanctioning of numerous judges as well as improvements in judicial selection procedures and court infrastructure." [156]

The Ninth Circuit, relying on *Tuazon*, stated that a party that wants to demonstrate that a foreign forum is inadequate "due to corruption" bears the burden to "make a 'powerful showing' that includes specific evidence."[157] After acknowledging the conflicting views of the expert witnesses, the Ninth Circuit noted that the district court correctly recognized that "one of the central ends of the *forum non conveniens* doctrine is to avert 'unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.' "[158] As such, the Ninth Circuit agreed with the district court's finding that the evidence did not support a finding that the Peruvian judicial system was "so fraught with corruption, delay and bias as to provide 'no remedy at all.' "[159]

However, a decidedly different result occurred in the 2015 case *In re Montage Technology Group Ltd. Securities Litigation*.[160] In this case, the defendant Montage was a Cayman Islands corporation that was "headquartered and primarily conducting business in China."[161] The plaintiffs were a class of individuals who had purchased Montage securities and who subsequently alleged "violations of [s]ections 10(b) and 20(a) of the Securities Exchange Act of 1934."[162] The defendants filed a motion to dismiss the case under Rule 12(b)(6) "and on the grounds of *forum non conveniens*."[163]

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[155] *Id.*

[156] *Id.*

[157] *Id.* (quoting Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1179 (9th Cir. 2006)).

[158] *Id.* (quoting Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr., 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001)). *See also* Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 499 (2d. Cir. 2002) (refusing to "pass value judgments on the adequacy of justice and the integrity of [Ukraine's] judicial system on the basis of no more than . . . bare denunciations and sweeping generalizations" (first alteration in original)); El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 678 (D.C. Cir. 1996) (holding that the plaintiff's generalized allegations regarding the lack of impartiality in the Jordanian judicial system was not sufficient to find that the Jordanian courts were inadequate).

[159] *Carijano*, 643 F.3d at 1226–27 (quoting *Tuazon*, 433 F.3d at 1179).

[160] 78 F. Supp. 3d 1215, 1219 (N.D. Cal. 2015).

[161] *Id.*

[162] *Id.*

[163] *Id.* at 1220.

In addressing the *forum non conveniens* motion, the district court began its analysis by stating that the defendants must demonstrate "that an alternative forum exists, and that it is adequate."[164] The district court first determined that China was an available forum as the "[d]efendants [were] amendable to service of process in [China]."[165] The question then turned to "whether the forum provide[d] an adequate remedy for [the] plaintiffs' alleged injuries."[166]

Both the plaintiffs' and defendants' experts provided testimony regarding Chinese securities law and whether its application would allow a remedy for plaintiffs' securities issues. The plaintiffs specifically argued that Chinese law would not apply to the securities claims as the law governed only domestic Chinese securities issuances and transactions, not disputes arising from securities transactions that occurred in the United States.[167] Further, the plaintiffs argued that the Chinese securities law was only applicable once a criminal judgment was entered against the defendant and no such finding could occur as the court had "jurisdiction only over domestic securities markets."[168] The defendants countered these arguments by asserting that, while the Chinese law did not specifically authorize suits against non-Chinese companies, it did not preclude them, and that the inability of the courts to issue a criminal judgment did not preclude the court from issuing a remedy in a private securities fraud case.[169] While the court refused to resolve the issues of Chinese law raised by the experts, it found that the defendants' rebuttal of plaintiffs' experts relied on "speculation as to what [Chinese] courts *could* do. They *could* interpret the [applicable] Regulations to include jurisdiction over foreign securities transaction . . . and *could* waive the typical prerequisites to bring securities fraud suits."[170] Based on this indefinite speculation, the court was not convinced that the plaintiffs would have a

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[164] *Id.* at 1221 (quoting *Tuazon,* 433 F.3d at 1178).

[165] *Id.* "[A]n alternative forum ordinarily exists when the defendant is amenable to service of process in the foreign forum." *Id.* (alteration in original) (quoting Lueck v. Sundstrand Corp., 236 F.3d 1137, 1143 (9th Cir. 2001)).

[166] *Id.* "The foreign forum must provide the plaintiff with some remedy for his wrong in order for the alternative forum to be adequate." *Id.* (quoting *Lueck*, 236 F.3d at 1143).

[167] *Id.* at 1222.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1222–23.

remedy in the foreign forum and denied the motion to dismiss on grounds of *forum non conveniens*.[171]

Yet, shortly thereafter, in the 2016 case of *Jiangsu Hongyuan Pharmaceutical Co. v. DI Global Logistics, Inc.*, the Chinese courts were found to be an adequate available forum for a lawsuit based on "contractual and noncontractual claims" due to the defendant's failure to pay for "shipments of chemical products."[172] The United States District Court for the Southern District of Florida reviewed the availability of China and concluded that the defendant "agreed to submit to China's jurisdiction."[173] In the court's estimation, "[w]hether China is an available alternative forum is a simple inquiry in this instance, as '[a]n agreement by the defendant to submit to the jurisdiction of the foreign forum typically satisfies the availability requirement.' "[174]

In addition to determining the availability of the foreign forum, the district court also had to decide whether the foreign forum was adequate. The court began its analysis by looking to *Leon v. Millon Air, Inc.*, and stated that the defendant only has the burden of persuasion with respect to establishing adequacy when the plaintiff first "*substantiates* its allegations of corruption or delay."[175] The plaintiff, Hongyuan, provided scholarly articles as evidence of the inadequacy of the Chinese judicial system indicating "potential for excessive trial delays, obstructive legal counsel, corruption, lack of legal safeguards, [and] undue influence by political leadership."[176] The court, in reviewing decisions by other district courts, found that "[t]he great weight of authority holds that 'generalized, anecdotal complaints of corruption are not enough for a federal court to declare that [a nation's] legal system is so corrupt that it can't serve as an adequate forum.' "[177] Thus, the district court held that plaintiff's generalized, anecdotal, and unsubstantiated evidence was too speculative to warrant a finding that China would not provide an adequate forum.[178]

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[171] *Id.* at 1223.

[172] 159 F. Supp. 3d 1316, 1320–21 (S.D. Fla. 2016).

[173] *Id.* at 1332.

[174] *Id.* (alteration in original) (quoting Tang v. Synutra Int'l, Inc., No. DKC 09-0088, 2010 WL 1375373, at *5 (D. Md. Mar. 29, 2010), *aff'd*, 656 F.3d 242 (4th Cir. 2011)).

[175] *Id.* at 1330 (citing Leon v. Millon Air, Inc., 251 F.3d 1305, 1312 (11th Cir. 2001)).

[176] *Id.* (alteration in original).

[177] *Id.* (second alteration in original) (quoting Stroitelstvo Bulg. Ltd. v. Bulg.-Am. Enter. Fund, 589 F.3d 417, 421 (7th Cir. 2009)).

[178] *Id.* at 1331–32.

III. ADEQUATE AVAILABLE FORUM—HOW COURTS ARE INFLUENCED IN THEIR DECISION-MAKING

As is apparent from the previous Part, many determinants affect how a court will address the issue of whether an alternative forum is adequate. To better understand and categorize the factors that impact the court's decision-making on this issue, Michael Lii performed an empirical examination of adequate available forum decisions.[179] After setting the time and search parameters to identify cases that analyzed adequate alternative forums, Lii identified 1,083 cases that involved a decision about *forum non conveniens* with an alternative forum in a foreign country, which was eventually whittled down to 692 cases.[180]

Lii determined that between 1982 and 2006, 105 different countries were discussed as adequate alternative forums in *forum non conveniens* analyses.[181] However, only eighteen percent of the decisions were denials of the *forum non conveniens* motion "based on inadequate forum."[182] In other words, "a foreign forum was judged to be adequate 82% of the time [throughout] the period of 1982 through 2006."[183] Further, whether a case involved a tort claim or a contract dispute was statistically insignificant in determining whether a foreign forum was adequate, as courts found the forum adequate over eighty-three percent of the time in such cases.[184]

Cases were also analyzed using variables that were determined to possibly "influence a judge's perception" of the adequacy or inadequacy of a foreign court, such as "measures of political rights, civil liberties, political stability, government effectiveness, rule of law, and corruption."[185] Lii posited that countries with more "political rights and civil liberties" may have a higher degree of adequacy determinations by the courts than those countries that are considered "more repressive."[186]

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[179] Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of* Forum Non Conveniens, 8 RICHMOND J. GLOB. L. & BUS. 513, 513 (2009).

[180] *Id.* at 521–22.

[181] *Id.* at 525.

[182] *Id.* at 526 tbl.4.

[183] *Id.*

[184] *Id.* at 531 tbl.10 (showing that 250 contract cases were reviewed in which an adequate forum was found 83.6% of the time and 354 tort cases which included "personal injury, defamation, and tort" and in which an adequate forum was found 83.9% of the time).

[185] *Id.* at 522.

[186] *Id.* at 537.

Utilizing a study by Freedom House, an organization that measures political rights and civil liberties and classifies countries as "free, partly free, and not free," Lii determined that courts found a foreign forum in a free country as adequate eighty-six percent of the time, while a foreign forum in a partly free country was found adequate seventy-eight percent of the time, and not free countries were found adequate only sixty-four percent of the time.[187] Lii extrapolated from this data that "district courts are less apt to find an adequate forum in countries with fewer political rights and fewer civil liberties."[188]

A similar result occurs in examining a foreign country's degree of political instability and government effectiveness, rule of law, and control of corruption.[189] With respect to political instability, Lii classified countries in three tiers: the bottom third of the countries were classified unstable, the middle third were considered medium stable, and the top third of the countries were classified as stable.[190] Of those countries classified unstable, district courts still found the forums an adequate alternative seventy-three percent of the time, despite the risk of government coups or civil war.[191] Countries that were considered either medium stable or stable were found to have judicial systems that provided adequate forums eighty-four percent of the time.[192]

As with political stability, Lii ranked government effectiveness, rule of law, and control of corruption. According to Lii, "[e]ffective governments go hand-in-hand with confidence that the rule of law governs society and a lack of corruption within

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[187] *Id.*

[188] *Id.* at 537–38.

[189] Political instability is defined as "a real risk that the government could be overthrown or a real risk of civil war [which] could leave the courts malfunctioning or unable to adjudicate disputes." *Id.* at 539.

> Government effectiveness measures the quality of the civil servants in a country and the independence of the civil service from political pressures. Rule of law seeks to measure the confidence . . . individuals have that the rules of law in a country will be obeyed and enforced as well as the effectiveness and predictability of the judiciary. Control of corruption is a measure of how well a society controls the use of public power for private gain.

Id. at 541 (footnotes omitted) (citing *FAQ*, WORLD BANK: WORLD GOVERNANCE INDICATORS, https://info.worldbank.org/governance/wgi/Home/FAQ [https://perma.cc/4WP3-UXU3] (last visited Nov. 4, 2020)).

[190] *Id.* at 540 tbl.18.

[191] *Id.* at 539–40, 540 tbl.18.

[192] *Id.* at 540 tbl.18.

government institutions."[193] This grouping was then broken into three tiers, with each tier containing approximately one-third of the countries observed. The bottom one-third contained those countries that were "the average of the least effective governments, the least respect for the rule of law countries, and the most corrupt countries."[194] With regard to this bottom tier, district courts found that despite the lack of effective government, respect for the rule of law, and corruption, the forum was still adequate sixty-seven percent of the time.[195] In contrast, those countries in the top tier—with the most effective government, respect for the rule of law, and least corrupt—had adequate forums eighty-six percent of the time.[196] Based on these results, Lii rightly concludes that when district courts are reviewing whether an alternative foreign forum is adequate, the court is influenced by factors outside the parameters of the *Piper* decision, including "the political, social, and economic conditions" of the foreign forum, potentially without being fully apprised or informed of the critical information needed to make such a determination that could affect foreign relations.[197]

IV. SEPARATION OF POWERS—WHO HAS THE AUTHORITY OVER FOREIGN RELATIONS?

A central tenet of our tripartite constitutional government is the division of powers among the three branches of federal government and the resulting checks and balances that result from this separation. However, no unifying doctrine with respect to separation of powers has evolved over the two hundred years that the term has been used in the American constitutional framework.[198] The concept of separation of powers and the concurrent, complementary balance of powers is based upon the Framers' experiences surrounding the duties and problems of managing a government. "The [F]ramers of the American Constitution did not want a political system so fragmented in structure, so divided in authority, that government could not function."[199]

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[193] *Id.* at 541.
[194] *Id.*
[195] *Id.* at 542.
[196] *Id.*
[197] *Id.* at 552.
[198] GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 8 (1997).
[199] LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 7–8 (6th ed. 2014).

On May 30, 1787, the Framers adopted a resolution "that a national government ought to be established consisting of a supreme Legislative, Judiciary, and Executive,"[200] which was basically the entire discussion regarding separation of powers by the Framers. Almost one hundred and fifty years later, Justice Story stated that the Framers adopted separation of powers but "endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties."[201] This position carried forward to present day with the Supreme Court opining in *Morrison v. Olson* that the Court has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' "[202] To best understand, then, the role of the Executive with respect to foreign relations, one must look to original understanding and meaning of executive power, historical practice by the Executive, and the explicit constitutional structure regarding the Executive's role in foreign affairs.

With respect to the area of foreign affairs, the Constitution provides "checks and balances" by distributing powers among the three branches of federal government, "with specified procedures setting forth how these powers can be exercised and how the various entities interact."[203] The Framers, while advocating policies and positions that supported separation of powers among the three branches of government, based on their experiences with the inefficiencies of the Continental Congress, also desired a separate and independent Executive.[204] While no "foreign affairs" clause exists in the Constitution that explicitly and exclusively grants foreign affairs powers to the President, the conduct of foreign affairs and its accompanying powers often has rested with the Executive.

In achieving the separation of powers such that the three branches act as checks and balances on each other, it is important to recognize that many of the powers exercised by the branches are implied rather than explicit. As early as 1793, Alexander Hamilton, using "Pacificus" as a pseudonym, stated that

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[200] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 29–31 (Max Farrand ed., 1966).

[201] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 396 (Melville M. Bigelow ed., Little, Brown, & Co. 5th ed. 1891) (1833).

[202] 487 U.S. 654, 693–94 (1988) (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

[203] RAMSEY, *supra* note 17, at 4.

[204] FISHER, *supra* note 199, at 9.

President Washington's authority to issue the Neutrality Proclamation[205] was derived from Article II of the Constitution that "[t]he executive Power shall be vested in a President of the United States of America."[206] It was Hamilton's view that outside of the Senate's power to advise and consent in the appointment of officers, its role in making treaties, and Congress's explicit authority to declare war, "all other executive powers were lodged solely in the President."[207] That being said, courts are not forbidden to address cases that touch upon foreign affairs, and will routinely decide cases that have foreign relations implications. Courts should not engage, however, in foreign affairs policymaking that is normally reserved as the purview of the Executive.

The notion that the Executive has inherent foreign affairs powers that are not explicitly reserved to the Executive or to Congress and that are therefore derived extra-constitutionally has been embraced by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,[208] *Dames & Moore v. Regan,*[209] and reaffirmed recently in *Zivotofsky v. Kerry*.[210] In *Curtiss-Wright*, Justice Sutherland wrote for the Court that the President was "the sole organ of the federal government in the field of international relations."[211] In 1934, President Roosevelt imposed an embargo prohibiting arms sales to both Bolivia and Paraguay.[212] Curtiss-Wright violated the embargo and was prosecuted by the federal government.[213] The company claimed that the embargo was unconstitutional on the grounds that Congress

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[205] *Id.* at 15–16. The Neutrality Proclamation was a declaration by President Washington regarding America's neutrality in the war between England and France. George Washington, *Neutrality Proclamation*, FOUNDERS ONLINE (Apr. 22, 1793), https://founders.archives.gov/documents/Washington/05-12-02-0371 [https://perma.cc/T4KW-KL9Y]. Relying on the "law of nations" President Washington instructed all Americans to avoid involvement in the war or face prosecution. *Id.*

[206] U.S. CONST. art. II, § 1.

[207] FISHER, *supra* note 199, at 15–16 (citing 4 THE WORKS OF ALEXANDER HAMILTON 439 (Henry Cabot Lodge ed., 1904)).

[208] 299 U.S. 304, 329 (1936).

[209] 453 U.S. 654, 685–86 (1981).

[210] 576 U.S. 1, 13–14 (2015).

[211] 299 U.S. at 320. Many commentators have questioned the reasoning of *Curtiss-Wright*, and subsequent Supreme Court decisions prior to *Zivotofsky v. Kerry* had not given it much weight. *See, e.g.*, RAMSEY, *supra* note 17, at 14. However, lower court judges, scholars, and lawyers have continued to invoke the reasoning of *Curtiss-Wright* to argue that the President "has a special role in foreign affairs" that reaches beyond the text of the Constitution. *Id.*

[212] *Curtiss-Wright,* 299 U.S. at 311–13.

[213] *Id.* at 311.

had delegated too much authority to the Executive.[214] The Court ruled against Curtiss-Wright based on the President's broad powers in the area of foreign affairs despite the Constitution's silence on this particular subject.[215] The Court reasoned that simply because the Constitution did not explicitly grant a particular foreign affairs power to the Executive did not mean that it did not exist.[216]

Further, even though areas of overlap between Congress and the President regarding the exercise of foreign affairs exist in the Constitution, when Congress fails to act, the President may exercise authority. During the Korean War, as a result of a threatened strike at major United States steel manufacturing mills that endangered the production of supplies needed for the war, President Harry Truman ordered that the government take control of the mills.[217] Congress did not authorize this action; rather, the President asserted that he was acting under his own implied Constitutional authority.[218] Justice Black, writing for the Court in *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, disagreed with President Truman's stance and stated that presidential power had to come either through an act of Congress or directly from specific provisions of the Constitution.[219]

Justice Jackson, while agreeing with the outcome of the Court, wrote in his concurrence in the *Steel Seizure Case* what has now become the familiar tripartite framework regarding the exercise of presidential power.[220] First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[221] Second, "in absence of either a congressional grant or denial of authority" there exists a "zone of twilight in which he and Congress may have concurrent authority," and where "congressional inertia, indifference or quiescence may" allow the Executive to exercise his power.[222] Finally, if "the President takes measures

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[214] *Id.* at 314–15.
[215] *Id.* at 318–20, 322.
[216] *Id.* at 321–22.
[217] Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 583 (1952).
[218] *Id.* at 583–84.
[219] *Id.* at 691.
[220] *Id.* at 634 (Jackson, J., concurring).
[221] *Id.* at 635.
[222] *Id.* at 637.

incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any costitutional powers of Congress over the matter."[223]

Justice Jackson indicated that because Congress had disapproved of the presidential action of the seizure of the steel mills, the President's authority was at its "lowest ebb."[224] This condition effectively prevented the President's actions unless his decision was grounded in Constitutional textual authority.[225] Further, if Congress had not disapproved, then the President would take action in a "zone of twilight" where constitutional authority is not explicit, but rather, where implied authority to act is often found.[226] Jackson's formulation of presidential authority with regard to foreign affairs "assumed that the Constitution was incomplete on key foreign affairs matters, and that the gaps would be filled in other ways."[227] Thus, Jackson's belief, as articulated in the *Steel Seizure Case*, was that the President's authority to act in foreign affairs was created as a result of "the branches of government . . . implicitly[ ] working together.[228]

Events in 1979 resulted in the Supreme Court again looking at the Executive's power with regard to foreign affairs. The precursor to the Supreme Court decision in *Dames & Moore v. Regan* was the conflict that resulted between the Islamic Republic of Iran and the United States of America that began with the taking of hostages at the United States Embassy. On the morning of November 4, a group of Iranian students stormed and seized the American Embassy and, with the coordination and ultimate complicity of the Iranian government, restrained over 50 United States embassy personnel against their will for 444 days.[229] The Iranian Hostage crisis resulted in President Carter taking a series of punitive actions against the Islamic Republic of Iran, including freezing Iranian assets in the United States.[230]

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[223] *Id.*

[224] *Id.* at 637–38, 640.

[225] *Id.* at 637–38.

[226] *Id.* at 637.

[227] RAMSEY, *supra* note 17, at 53.

[228] *Id.*

[229] MARK BOWDEN, GUESTS OF THE AYATOLLAH: THE FIRST BATTLE IN AMERICA'S WAR WITH MILITANT ISLAM 2, 5, 639 (2006).

[230] President Carter acted pursuant to the International Emergency Economic Powers Act, and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities[,] and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." Exec. Order No. 12,170, 3 C.F.R. 457 (1979).

At the same time, United States citizens brought thousands of claims against Iranian entities in United States courts for losses suffered when the Islamic Republic took over the country and ousted the then-leader, the Shah of Iran.[231]

The United States and the Islamic Republic of Iran eventually began negotiations to resolve the issues that arose due to the Islamic Republic of Iran's gross violations of international law.[232] Two of the most important issues to be resolved during the negotiations for the release of the hostages were how to deal with the Iranian assets that were frozen in the United States and how to address the many thousands of claims that United States citizens had against Iran in an appropriate forum.[233]

After several months of discussions, on January 18, 1981, the United States and the Islamic Republic of Iran reached an agreement memorialized in two Declarations of the Government of the Democratic and Popular Republic of Algeria, known as the Algiers Accords.[234] The two Declarations—the General Declaration and the Claims Settlement Declaration—addressed the

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[231] On November 15, 1979, the Department of Treasury's Office of Foreign Assets Control issued a regulation that provided that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran." 31 C.F.R. § 535.203(e) (1980). On November 26, 1979, President Carter authorized "[c]ertain judicial proceedings" against Iran but did not allow the "entry of any judgment or of any decree or order of similar or analogous effect . . . ." 31 C.F.R. § 535.504(b)(1) (1979).

[232] Roberts B. Owen, *The Final Negotiation and Release in Algiers*, *in* AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS 297, 298 (Paul H. Kreisberg ed., 1985).

[233] *Id.* at 301.

[234] CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 6–7, 7 n.16 (1998); GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL 5 & n.3 (1996). Even though the two governments only "adhered to" the provisions of the Algiers Accords and neither the United States Senate nor the Iranian Majlis ratified the Accords, the document constitutes a "treaty" under international law. *See* United States v. Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 189, 207 (1985) (Brower, Arb., concurring) ("This Tribunal has frequently resorted to the [Vienna] Convention in interpreting the Algiers Accords and the State Parties have declared the Convention to provide the applicable law of interpretation."); *see also* Nasser Esphahanian v. Bank Tejarat, 2 Iran-U.S. Cl. Trib. Rep. 157, 160 (1983) ("Since the Claims Settlement Declaration and the General Declaration together constitute a Treaty under international law, we are guided in interpreting them by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of May 23, 1969.").

obligations of the two governments vis-à-vis one another.[235] The General Declaration provided that Iran would release the hostages and that the United States would perform a series of actions and financial transactions, including releasing and returning the assets frozen by President Carter[236] and nullifying judicial attachments against Iran obtained by litigants in United States courts.[237]

The Claims Settlement Declaration of the Algiers Accords provided for the creation of the Iran-United States Claims Tribunal.[238] This declaration provided that a Tribunal would be "established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States . . . [which arose] out of debts, contracts, . . . expropriations or other measures affecting property rights."[239] Additionally, the Tribunal had jurisdiction over claims of the two governments against each other "arising out of contractual arrangements between them for the purchase of goods and services," and over "dispute[s] as to the interpretation or performance of any provision" of the Algiers Accords.[240] However, claims by the hostages that resulted from their illegal captivity were specifically excluded from the Claims Settlement Declaration.[241] This exclusionary decision was subsequently ratified through Executive Order[242] and has been upheld consistently

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[235] General Declaration, Declaration of the Democratic and Popular Republic of Algeria, Jan. 19, 1981 [hereinafter General Declaration], http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf [https://perma.cc/X5Q8-T2C6]; Claims Settlement Declaration, Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981 [hereinafter Claims Settlement Declaration], http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf [https://perma.cc/7CRB-UKWM].

[236] The sanctions were revoked by Executive Orders issued contemporaneously with the Algiers Accords. *See* Exec. Order Nos. 12,276–12,285, 3 C.F.R. 104–15 (1981); Exec. Order No. 12,294, 3 C.F.R. 139 (1981).

[237] General Declaration, *supra* note 235.

[238] Claims Settlement Declaration, *supra* note 235, art. II, ¶ 1.

[239] *Id.*

[240] *Id.* art. II, ¶¶ 2–3.

[241] *Id.* art. II, ¶ 1; General Declaration, *supra* note 235, ¶ 11.

[242] Prohibition Against Prosecution of Certain Claims, 31 C.F.R. § 535.216(a) (1981). The exclusion was necessary in order to successfully implement the Algiers Accords. Exec. Order No. 12,294, 3 C.F.R. 139 (1981). The focus of the Claims Settlement provisions were solely on property issues, specifically expropriation claims and contract losses. Claims Settlement Declaration, *supra* note 235, art. II.

by the judiciary, despite numerous cases filed by the former hostages.[243]

Upon the approval of the Algiers Accords, President Ronald Reagan suspended all lawsuits in United States courts against Iran that were within the Tribunal's jurisdiction.[244] When the United States construction company Dames & Moore, among others, decided to challenge the constitutionality of this Executive Order, the Supreme Court of the United States, in expedited proceedings, upheld the President's authority to suspend lawsuits in the United States in favor of the alternative forum of the Iran-United States Claims Tribunal.[245]

Dames & Moore had claims against the Government of Iran, the Atomic Energy Organization of Iran, and several Iranian banks, which it had filed in United States court.[246] Dames & Moore claimed that the Atomic Energy Organization terminated the contract "for its own convenience," and as a result, owed Dames & Moore over $3 million "plus interest for services performed under the contract prior to its termination."[247] With the signing of the Algiers Accords, Dames & Moore's suit was

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[243] *See, e.g.*, Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C. Cir. 1984); Ledgerwood v. State of Iran, 617 F. Supp. 311, 316 (D.D.C. 1985). The United States Government agreed to bar claims by the hostages because it concluded that, since the 1976 Foreign Sovereign Immunities Act would likely preclude United States courts from hearing claims of that nature, such claims would lack merit. *See The Iran Agreements: Hearings Before the S. Comm. on Foreign Rels.*, 97th Cong. 98 (1981) (statement of Thomas W. Luce III, Outside General Counsel, Electronic Data Systems Corp.). However, to ensure that the hostages were not left empty-handed, Congress passed two statutes–the Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967 (codified at 5 U.S.C. § 5561) and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 803, 100 Stat. 853 (codified at 5 U.S.C. §§ 5569–70). The hostages, despite the commitment of the United States in the Accords and the explicit waiver by the United States of their lawsuits, have filed claims against Iran for monetary damages. To date, all of these lawsuits have been unsuccessful. Most recently, the plaintiffs sought compensatory and punitive damages in the amount of $33 billion. Roeder v. Islamic Republic of Iran*,* 333 F.3d 228, 230, 239 (D.C. Cir. 2003). However, the United States Court of Appeals for the District of Columbia held that, since Congress did not expressly indicate a clear intent to abrogate the Algiers Accords with amendments to the Foreign Sovereign Immunities Act, the court had to uphold the commitments that the United States made to the Islamic Republic of Iran in order to secure the freedom of the hostages in 1981. *Id.* at 237–38. *See also* Roeder v. Islamic Republic of Iran, 646 F.3d 56, 62 (D.C. Cir. 2011) (finding that, absent specific congressional intent, the 2008 amendments to the Foreign Sovereign Immunities Act did not abrogate the Algiers Accords).

[244] *See* Exec. Order No. 12,294, § 1, 3 C.F.R. 139.

[245] Dames & Moore v. Regan*,* 453 U.S. 654, 655–58, 690 (1981).

[246] *Id.* at 663–64.

[247] *Id.*

terminated in favor of filing for redress before the Iran-United States Claims Tribunal.[248]

Subsequent to President Reagan's Executive Order suspending all claims against Iran, Dames & Moore filed an action for "declaratory and injunctive relief" in order "to prevent enforcement of the Executive Orders and Treasury regulations."[249] Dames & Moore argued that the Executive exceeded its statutory and constitutional powers in implementing the Algiers Accords.[250]

The Court started its analysis by recognizing that the question stemmed from the "consequences of different types of interaction between the two democratic branches in assessing presidential authority to act in any given case."[251] While the Supreme Court recognized that the President's actions with regard to releasing and returning frozen Iranian assets had statutory support,[252] the Court did not find any explicit statutory or constitutional authority for suspending or terminating litigation in United States courts in favor of binding arbitration before the Iran-United States Claims Tribunal.[253] Yet, the Court upheld the President's action by reviewing a combination of factors.

First, the court determined that statutes upon which the President relied did not provide specific authorization, but rather, the statutes were "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[254] Second, the Court looked specifically to the enactment of the International Claims Settlement Act of 1949.[255] Along with a full discussion of this Act and its subsequent amendments, the Court cited ten other settlements since 1952 with foreign countries to

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[248] On February 24, 1981, President Reagan "suspended" all "claims which may be presented to the . . . Tribunal." Exec. Order No. 12,294, § 1, 3 C.F.R. 139. These claims "shall have no legal effect in any action now pending in any court of the United States." *Id.*

[249] *See Dames & Moore*, 453 U.S. at 666–67.

[250] *Id.* at 667.

[251] *Id.* at 668.

[252] *Id.* at 674 (Because the President's action in nullifying the attachments and ordering the transfer of assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952))).

[253] *Id.* at 675.

[254] *Id.* at 677.

[255] *Id.* at 680.

which Congress had not objected that supported its "conclusion that Congress ha[d] implicitly approved the practice of claim settlement by executive agreement."[256] Finally, Congress had not disapproved of the President's suspension of claims. Although Congress held hearings on the Algiers Accords, "Congress ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement."[257] As a result, the Court determined that Congress had not "resisted the exercise of Presidential authority."[258]

Executive power over foreign affairs was once again judicially tested in *Zivotofsky v. Kerry*. In 2002, Menachem Binyamin Zivotofsky was born in Jerusalem to United States citizens; shortly thereafter, his mother went to the United States embassy in Tel Aviv to request a passport for her infant son.[259] Zivotofsky's mother indicated to embassy officials that she wished her son's place of birth to be listed on the passport as "Jerusalem, Israel."[260] Embassy personnel explained that, according to United States Department of State policy, the passport would list only "Jerusalem" as Zivotofsky's place of birth.[261] Zivotofsky's parents were dissatisfied with this response and sued in the United States District Court for the District of Columbia, seeking to enforce section 214(d) of the Foreign Relations Authorization Act in which Congress allowed citizens born in Jerusalem to list their place of birth as Israel.[262] The district court dismissed the case on two grounds: first, finding that Zivotofsky lacked standing, and second, that the case presented a political question that the court could not resolve.[263] Zivotofsky appealed and the D.C. Circuit reversed the district court on the standing issue, but affirmed that the issue was a political question.[264] The Supreme

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[256] *Id.* at 679–80.

[257] *Id.* at 687.

[258] *Id.* at 688.

[259] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 8 (2015).

[260] *Id.*

[261] *Id.* Congress enacted the Foreign Relations Authorization Act for Fiscal Year 2003, in which Section 214(d) states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350 (2002). Both the Bush and Obama Administrations refused to comply with this statutory provision.

[262] *Zivotofsky,* 576 U.S. at 8.

[263] *Id.* at 9.

[264] *Id.*

Court disagreed with the D.C. Circuit regarding the political question doctrine, and remanded the case to the D.C. Circuit for a decision on the merits.[265] The D.C. Circuit determined that the statute was unconstitutional as it impeded the President's ability to "recognize a foreign sovereign."[266]

The case was appealed to the Supreme Court for a second time, with the Court this time affirming the D.C. Circuit.[267] Justice Kennedy, writing for the majority, began the Court's analysis by moving from a strict constitutional textualism to an implicit recognition of presidential power, along with a functional consideration of the relationship between Congress and the President. In *Zivotofsky*, the Court noted "the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not."[268] In support of this statement, the Court reasoned that the President is best situated to engage in "decisive, unequivocal action necessary to recognize other states at international law."[269] The Court justified this conclusion based on the Framers designating the President with "the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors."[270] As one commentator noted, Justice Kennedy's majority opinion embraced the tenet that the "President's exclusive power to recognize states and governments is a practical function of constitutional structure."[271]

While Justice Kennedy blessed this executive authority with one hand, he did provide some limits with the other hand. The majority emphasized that the language in *Curtiss-Wright*, that "[t]he President is the sole organ of the nation in its external relations," was dicta and that it does not govern the relationship between Congress and the President with respect to diplomatic relations.[272] Specifically, while the "President does have a unique role in communicating with foreign governments . . . it is still the Legislative Branch, not the Executive Branch, that makes the

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[265] *Id.*

[266] *Id.* (quoting Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 214 (D.C. Cir. 2013)).

[267] *Id.* at 31–32.

[268] *Id.* at 14.

[269] *Id.* at 15.

[270] *Id.*

[271] Harlan Grant Cohen, Zivotofsky II*'s Two Visions for Foreign Relations Law*, 109 AJIL UNBOUND 10, 11 (2015); *see also Zivotofsky,* 576 U.S. at 12.

[272] *Zivotofsky,* 576 U.S. at 20–21 (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936)).

law."[273] "The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."[274] But "[e]ven as [Justice Kennedy] buries Justice Sutherland's famous functionalist pro-President dicta in *Curtiss-Wright*, Justice Kennedy revealed himself Sutherland's true heir, embracing the logic and tropes that defined Sutherland-authored opinions in *Curtiss-Wright* and [*United States v.*] *Belmont*."[275] Kennedy indicated that "the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States."[276] Further, "the Nation must 'speak . . . with one voice,' " with the President "engaging in . . . delicate and often secret diplomatic contacts."[277]

Equally important in understanding the *Zivotofsky* decision is historical gloss. "Historical practice often plays a significant role in assessments of the Constitution's distribution of authority among the three federal branches of government, especially in the area of foreign affairs."[278] While it is uncertain that the recognition power was historically reserved to the Executive because Congress accepted exclusive presidential authority or because Congress had simply not disagreed with the exercise of executive authority,[279] the *Zivotofsky* Court noted that "it is appropriate to turn to accepted understandings and practice" and that "on balance [history] provides strong support for the conclusion that the recognition power is the President's alone."[280] Thus, historical gloss is especially relevant to determinations of presidential power. When authority is uncertain, "[t]he longstanding 'practice of the government' can inform [the Court's] determination of 'what the law is' " in a separation-of-powers case.[281]

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[273] *Id.* at 21.

[274] *Id.*

[275] Cohen, *supra* note 271, at 12 (footnotes omitted) (citing United States v. Belmont, 301 U.S. 324 (1937)).

[276] *Zivotofsky*, 576 U.S. at 14.

[277] *Id.* at 14–15 (first alteration in original).

[278] Curtis A. Bradley, *Historical Gloss, the Recognition Power, and Judicial Review*, 109 AJIL UNBOUND 2, 3 (2015) (citing Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers,* 126 HARV. L. REV. 411 (2012)).

[279] *Id.* at 5.

[280] *Zivotofsky*, 576 U.S. at 23.

[281] NLRB v. Canning, 573 U.S. 513, 525 (2014) (citation omitted) (first quoting M'Culloch v. Maryland, 17 U.S. 316, 401 (1891); and then quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

V. COURTS SHOULD DEFER TO THE EXECUTIVE IN DETERMINING AN ADEQUATE AVAILABLE FORUM UNDER SEPARATION OF POWERS

"In no cases do the courts of this country defer to executive suggestions as often and as fully as in those having international ramifications."[282] As evident from recent Supreme Court decisions, the Court places great weight on the United States government speaking "with only one voice" when it involves the national interest.[283] This role often fell to the United States Department of State as an obligation "to give the courts clear statements of the views of the political departments."[284]

For instance, the State Department historically was instrumental in setting forth the Executive's position with respect to sovereign immunity, to which the courts would grant almost complete deference. Foreign sovereign immunity is a well-established principle of both United States and international law. One of the first statements by the United States Supreme Court regarding this doctrine occurred in *The Schooner Exchange v. McFaddon*, where the Supreme Court relied on international law and territorial sovereignty to hold that a French vessel was immune from the jurisdiction of United States courts.[285] This absolute theory of sovereign immunity granted foreign states immunity with respect to any activity, be it governmental or commercial, and courts routinely applied it throughout the nineteenth and mid-twentieth centuries.

Eventually, the United States Department of State began to take a more directed role in whether the doctrine of foreign sovereign immunity was applicable. The Department of State, through a letter drafted by Jack Tate, the State Department Acting Legal Adviser, adopted the "restrictive theory" of foreign sovereign immunity, by which foreign countries retained sovereign immunity for public or governmental acts, but did not enjoy immunity with respect to private or commercial acts.[286] Courts then began to defer to positions taken by the Department of State

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[282] Michael H. Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461, 461 (1963).

[283] *Id.* at 462.

[284] *Id*. at 498.

[285] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 146–47 (1812).

[286] Letter of Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976), *and in* 26 Dep't State Bull. 984–85 (1952).

regarding whether or not immunity should be granted to a foreign government. The State Department developed a process by which it would make initial decisions about immunity. If the State Department decided immunity was appropriate, it would submit a "suggestion of immunity" to the court.[287]

The Executive was well within its constitutional prerogatives to provide suggestions of immunity to the courts regarding foreign sovereigns. Courts would often defer to the executive branch as the branch of government best suited to provide guidance on foreign policy issues. Additionally, Courts would routinely request and receive executive statements of interest supporting or denying application of sovereign immunity until Congress acted through passage of the Foreign Sovereign Immunities Act, thereby removing the Executive's discretion in this area and vesting the determination as to sovereign immunity and its exceptions in the courts.[288] Through this legislation, Congress implemented the restrictive theory of sovereign immunity and transferred from the Executive to the judiciary the responsibility for making the determination of sovereign immunity.[289] Again, acting under its constitutional authority, Congress has acted to limit executive power in the area of foreign affairs and provide statutory guidance to the courts as to how sovereign immunity should attach to governmental actions.[290]

Even though Congress has acted with respect to foreign sovereign immunity, with regard to determinations regarding the act of state doctrine, Congress has not intervened in a similar fashion. Courts will still solicit statements of interest from the State Department and may defer to executive pronouncements regarding an act of state. Likewise, Congress has not acted with any statutory decree with respect to *forum non conveniens* or determinations regarding the alternative available forum. As Congress has not disapproved, the President may take action in a

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[287] Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

[288] 28 U.S.C. § 1605 (2018).

[289] *See* William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 266 (1997).

[290] Despite this congressional mandate, the judiciary still gives greater deference to the Executive when the issue involves matters of international politics. *See, e.g.,* Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel, 221 F.3d 634, 643 (4th Cir. 2000) (finding that the Department of State was very influential in matters of international politics and its opinion should be given great weight); McDonald v. Socialist People's Libyan Arab Jamahiriya, 666 F. Supp. 2d 50, 51–52 (D.D.C. 2009) (giving weight to the United States' statement of interest when international settlement of claims with Libya was challenged).

"zone of twilight" where constitutional authority is not explicit, but rather, where implied authority to act is found. Absent any specific congressional intervention in this area of *forum non conveniens* decisions, the executive branch should opine on those cases that directly impact international comity or national policy, to which the courts should grant extreme deference.

A number of reasons exist to support the conclusion that courts are not the institution that should make the decisions as to what qualifies as an alternative available forum. Due to the burden of proof standard that the courts have devised for demonstrating the alternative available forum, the court's decision often simply becomes a rubber stamp of the defendant's argument that the available forum is adequate. Once the defendant asserts that the forum is available and adequate, this minimal showing often shifts the burden to the plaintiff to demonstrate that the forum is either not available, not adequate, or both. Some courts seem to apply a more rigorous standard for the plaintiff to prove that the forum is inadequate, especially once the defendant has made a *prima facie* showing that the forum is available and adequate. This higher barrier, whether implicit or explicit, which often cannot be met by the plaintiff, could be mitigated with statements of interest from the Executive when the issue regarding the adequacy of the forum involves international policy, such as corruption in the foreign government or political stability. Some courts have given little weight to a plaintiff's evidence regarding the adequacy of the forum. For instance, in *Tuazon v. R.J. Reynolds Tobacco Co.*, the court found that the evidence of plaintiff's personal experience testimony regarding corruption and judicial bias and State Department reports regarding human right abuses offered by the plaintiff did not overcome the defendant's arguments that the Philippines was an adequate available forum.[291] If the executive branch opined more directly, however, courts could give greater weight to such statements when the question before the courts affects foreign policy or international comity.

When the court deliberates on these questions, whether for reasons of judicial economy or based on the parties' shifting burdens of proof, it flies in the face of executive prerogative with respect to foreign relations. As posited by Professor Donald Childress in his article "*Forum Conveniens*: The Search for a Convenient

[291] 433 F.3d 1163, 1179 (9th Cir. 2006).

Forum in Transnational Cases" with respect to comity and executive prerogative, "is there a risk that transnational litigation enmeshes [United States] courts in questions of foreign policy and threatens the sovereignty of foreign nations?"[292] The simple answer is yes when separation of powers doctrine provides that the courts should defer to the Executive when making decisions that implicate foreign policy, especially when Congress has not spoken on the issue.

So, when should the courts defer to the Executive under the separation of powers doctrine in determining the alternative available forum when Congress has not legislated? Not every *forum non conveniens* case that involves a discussion of alternative available forum implicates foreign policy at a level that requires a separation of powers analysis. When the alternative available forum is a procedural question or a previously litigated judicial question, the court is ideally situated to weigh and balance the parties' evidence and ultimately opine on whether the foreign forum is available and adequate. For instance, in *Fireman's Fund Insurance Co. v. Thyssen Mining Construction of Canada, Ltd.*, the court found that Canada was not an adequate available forum because the statute of limitations had run under Canadian law.[293] Procedural determinations regarding statutes of limitations or collateral estoppel and *res judicata* in foreign forums are within the ambit of the judiciary and do not impinge upon the executive prerogative that surrounds sensitive calculations regarding foreign policy. Thus, courts should determine the adequacy of the available forum in these circumstances and not defer to the Executive, as foreign policy considerations are not implicated.

However, when the issue that affects the determination of either adequacy or availability of a foreign forum implicates distinct foreign relations with the foreign country such that it involves civil liberties, corruption, measures of political rights, government effectiveness, or political instability in the foreign forum, the Executive is in the unique position to determine whether an adequate forum exists. Congress has not legislated in this area so the Executive may engage in this "zone of twilight." Here, the federal government should have a single policy regarding which governments are legitimate in the eyes of

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[292] Donald Earl Childress III, Forum Conveniens*: The Search for a Convenient Forum in Transnational Cases,* 53 VA. J. INT'L L. 157, 158–59 (2012).

[293] 703 F.3d 488, 496 (10th Cir. 2012).

the United States. Courts are not properly disposed to decide these issues of foreign policy and may create potential problems when rendering decisions that may influence sensitive foreign policy objectives. The court in *Carijano,* in determining whether Peruvian courts were corrupt, indicated as much by stating that its analysis hinged on averting "unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations."[294] Thus, the Ninth Circuit ruled that Peru was an adequate available forum despite expert testimony that demonstrated that the Peruvian judiciary suffered from " 'institutionalized' corruption, including widespread lobbying of judges, third party informal 'intermediaries' between magistrates and parties, and the exchange of improper favors and information."[295] When assessing the adequacy of the forum resulting from allegations of judicial corruption, courts require a "powerful showing" with specific evidence, but are not requesting statements of interests from the Executive prior to making decisions that go to the core of foreign relations with a foreign government.[296] As such, courts are "impermissibly interfer[ing] with the President's [ability] to conduct the Nation's foreign affairs."[297] This level of "interference" in foreign policy should never occur, as the constitutional scheme does not allow it.

So why is it important that the judicial branch defer to the executive branch in determining whether an adequate available forum exists in a *forum non conveniens* case between private litigants? A serious foreign policy breach may develop if the courts do not provide deference to the Executive and instead overstep constitutional bounds and interfere with foreign policy. Such interference would render meaningless the determinations of the Executive in an arena oft reserved to it and would be done at the expense of a coequal branch of government—a branch of the government ill-suited for performing such a critical foreign policy analysis. Courts are extremely reluctant to review a foreign forum judicial system's independence, reliability, and ability, as is evident

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[294] Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1226 (9th Cir. 2011) (quoting Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr., 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001)).

[295] *Id.*

[296] *Id.* (quoting *Tuazon*, 433 F.3d at 1179).

[297] Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 202 (D.C. Cir. 2013), *aff'd sub nom.* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1 (2015).

from the decisions in the Second and Eleventh Circuit.[298] Relying on "considerations of comity," courts avoid judging a foreign justice system so as not to offend a foreign nation. This reluctance to engage in policy conversations that touch upon foreign relations is exactly why the judiciary should defer to the Executive in these situations.

When the determination regarding the forum centers on political considerations such as governmental corruption or political instability, the evidence that the courts need to examine in order to determine the adequacy of the forum from a foreign policy perspective is often not readily accessible to the parties or the court. That information is in the province of the executive branch that is constitutionally placed to weigh in on such issues through statements of interest. The court can then make fully informed decisions about the adequacy of a forum without relying on the adversarial nature of litigation to provide information that is critical to the decision and could ultimately affect foreign policy.

CONCLUSION

The arena of foreign relations policy is fraught with political landmines that are often best navigated by an Executive who "speaks with one voice" for the nation. While most *forum non conveniens* decisions are not controversial with respect to the issue of an adequate available forum, the occasional case will dip into territory best left to those who are responsible for safeguarding international relations. Courts are well positioned to determine the adequacy of foreign forums when the legal question regarding adequacy centers on procedural issues or easily decided questions of law. However, when the issue regarding the adequacy of the forum centers on governmental corruption, political instability, political rights, or civil liberties, it is not in the court's interest to make this determination, as it does not have the institutional capability to undertake the full analysis. The conversation should be a multi-branch conversation, with the Executive providing a statement of interest to the court as to the advisability and feasibility of a fair and full hearing in the foreign forum. This executive intervention may exist on a sliding scale—the more political and governmental legitimacy that the foreign forum

[298] Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1312 (11th Cir. 2002); Leon v. Millon Air, Inc., 251 F.3d 1305, 1311–12 (11th Cir. 2001); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998).

possesses, the more latitude the court may exercise in receiving information; the less political and governmental stability, the more likely the court is to defer to the Executive's statement. Such deference will provide more confidence in the court's final decision with respect to the alternative available forum. In this regard, the Executive would be involved in a narrow slice of cases where it would act as the gatekeeper. Such a function would act as a "negative trigger," such that the courts would not make a determination that affects these aspects of foreign policy without input from the Executive. This input rightly recognizes under separation of power doctrine the legitimacy and competency of the Executive to declare policy with respect to foreign forums.