I. INTRODUCTION

The subject of this symposium is “Foreign Affairs Litigation in the courts of the United States.” In these times, there’s absolutely no doubt about the fact that this is a most important topic. But I personally feel a little left out, because the subject of our panel is the U.S. Foreign Claims Settlement Commission (FCSC). And as most of you know, claims that get to the Commission are almost always filed long after the confrontation between the two countries has been resolved, they have already patched up their differences, and they have signed an agreement that allows the U.S. Government then to let its nationals file and receive compensation for the claims they legitimately have against the other government.

In other words, as you can all appreciate, the foreign policy problems or confrontations have all preceded and have been worked out between the two countries when the claims are filed with, and pending before, the Commission. While I will have no hesitation discussing one of the major problems currently pending in connection with the Libyan claims settlement agreement and the Commissions’ work in this area, I want to first alert you to an example of foreign affairs litigation that is right now a very real confrontation between two major governments—in this instance the United States and France. I would like very briefly to discuss this confrontation not only because it has not been considered in this successful Colloquium, but also because it is a confrontation for which there does not appear to be an easy solution like, for example, a claims settlement agreement. Moreover, the confrontation that I will be discussing revolves around what all of

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my colleagues know just happens to involve my favorite subject in international law, namely *forum non conveniens* and international air crash litigation in the U.S. Courts.

II. Confrontation between the United States and France

On December 7, 2011, the High Court of France, its Cour de Cassation, issued a decision in what is now quickly becoming the all-important *West Caribbean Airlines* case. As some of you know, this case involved an airline that was registered in Colombia, that did no business in the United States, and that was carrying some 152 Martinique citizens on a charter flight between Martinique and Panama when, en route back to Martinique, it crashed in Venezuela with no survivors. Suit was brought on behalf of the 152 Martinique citizens in the U.S. District Court in Miami and, without going into further details about the facts, I was retained as defense counsel and immediately filed a motion to dismiss the case under the doctrine of *forum non conveniens*. After extensive briefing on the *travaux préparatoire* of the Montreal Convention of 1999 and specifically on the issue of whether U.S. courts could apply the *forum non* doctrine in cases brought under that Convention, District Court Judge Ursula Ungaro issued a multi-page, comprehensive and very well-reasoned decision holding that the legislative history of Article 33(4) clearly established that U.S. courts could use and apply the doctrine in cases brought in the U.S. under the Montreal Convention. Judge Ungaro’s decision was appealed to the 11th Circuit Court of Appeals, which itself issued another very well-reasoned decision affirming in all respects Judge Ungaro’s decision.\(^2\)

Meanwhile, counsel for plaintiffs, in a collateral attack on the U.S. decisions, brought an action in the French lower court in Martinique seeking to prevail on that court to hold that *forum non conveniens* could not be used by a U.S. court under the Montreal Convention and that the case, therefore, had to be returned to the United States. A three-judge court heard that case in Martinique and in a lengthy opinion fully agreed with Judge Ungaro’s decision. That three-judge court decision was affirmed shortly thereafter by a French appellate court.

Despite all of these four decisions, and without even once alluding to them—much less discussing either their reasoning or the doctrine of international comity—the French Cour de Cassation accepted the case for review, and held that a plaintiff’s choice of forum under the Montreal Convention is inviolable and cannot be defeated by a U.S. court applying the *forum non conveniens* doctrine. The plaintiffs have since re-filed in Miami, and we are all awaiting to see what happens next. In the meantime, however, I would like to emphasize two points: first, this is a major and direct confrontation between the courts of two