(VERSION ORIGINAL) *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASOCIACION DE RECLAMANTES,
a Texas nonprofit corporation,
721 East Baker
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(512) 383-4691,

AMINTA ZARATE
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* Esta demanda en contra de Mexico se presentó ante los tribunales de los Estados Unidos de América el 18 de septiembre de 1981. En el momento de llevarla a la prensa ya se había presentado un petición por parte de México en la que esgrime que el tribunal estadounidense debe desechar la demanda formulada en su contra (Anexo II), así como la contraparte había denotado por conducto de un memorándum su oposición a la petición mexicana (Anexo III). Hasta este momento, el tribunal de la Unión Americana aún no ha fallado al respecto. Debe indicarse que el fundamento principal del alegato es el tratado celebrado entre México y los Estados Unidos de América el 19 de noviembre de 1941 (Anexo 23 del Capítulo I).

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(512),674-0292,

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Isac Garza 1515 Pte.
Monterrey, Nuevo Leon
Mexico
745846

SANTOS ZARATE PRIETO
Jesus Bernal 204
Aguascalientes, Aguascalientes
Mexico
65482

Plaintiffs,

v. Civil Action No.

THE UNITED MEXICAN STATES,
Defendant.

CLASS ACTION COMPLAINT
FOR TAKING OF PROPERTY

Plaintiffs Asociacion de Reclamantes, Aminta Zarate, Luis Riojas, Felipa Flores Benavidez, Maria Aguirre de Schultz, Nieves Guerrero Chapa and Santos Zarate Prieto, by and through their attorneys, of behalf of themselves and the class alleged herein,

EN LA CORTE DISTRITAL DE LOS ESTADOS UNIDOS
PARA EL DISTRITO DE COLUMBIA

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Demandantes

contra Acción Civil Número 81-2299

ESTADOS UNIDSO MEXICANOS,

Parte Demandada,

DEMANDA CLASISTA

Demandantes, Asociación de Reclamantes, Aminta Zarate, Luis Riojas, Felipa Flores Benavidez, María Aguirre de Schultz, Nieves
"José La Vatelli"; Decisión No. 66, "Daniel Baldi"; Decisión No. 70, "Giovani y Francesco Michelis"; Decisión No. 71, "Nicolás Freda"; Decisión No. 72, .

"Francisco Motta"; Decisión No. 76, "Giovani Repetto"; Decisión No. 77, "Antonio Zeni"; Decisión No. 78, "Bonifacio Vanzini"; Decisión No. 79, "Jacobo Zanell"; Decisión No. 80, "Luigi Zanella"; Decisión No. 82, "Antonio Lorenzini"; Decisión No. 83, "Antonio Zanella"; Decisión No. 85, "Mezzomo Eugenio"; Decisión 86, "Feriolo Hermanos"; Decisión No. 87, "Silvia Constantini Vda. de Chesani"; Decisión No. 88, "Catalina Buganza Vda. de Deneghi"; Decisión No. 89, "Francisco Croda Fu Angelo"; Decisión No. 91, "Giuseppe Mezzomo"; Decisión No. 92, "María Lorenzini Vda. de Zeni"; Decisión No. 93, "Francesco Bubanza"; Decisión No. 94, "Guiseppe Crivelli"; Decisión No. 95, "Altieri Biagio y Scipione Altieri"; Decisión No 96, "Sra. Luz Núñez Vda. de Gallo"; Decisión No. 97, "Teresa Alexander Vda. de Attilio Cielli"; Decisión No 98, "Ventura Torres Vda. de Antonio Orio"; Decisión No. 99, "Ernesta p. Vda. de Luis Prunetti"; Decisión No. 100, "Guaia-Ferreri Octavio"; Decisión No. 101, "Fernando Vignola y Fernando V. Vignola"; Decisión No. 102, "Visconti Vincenzo"; Decisión No. 103, "Lorenzo Acierno"; Decisión No. 104, "Antonio Salbitano"; Decisión No. 105, "Alfonso y Leopoldo Martello"; Decisión No. 107, "Onorato Pitcl"; Decisión No. 108. "Petra Abaunza Vda. de Carlo Busnelly"; Decisión No. 109, "Vincenzo Florenzano".

EN LA CORTE DISTRITAL DE LOS ESTADOS UNIDOS PARA EL DISTRITO DE COLUMBIA.

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* Esta versión en español fue elaborada por los demandantes. Se respetó íntegramente dicha traducción a pesar de que desde el punto de vista riguroso ella podrí haber sido mejorada.

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Demandantes

contra

ESTADOS UNIDOS MEXICANOS,

Parte Demandada.

(Documento original en inglés y traducción al español elaborada por los demandates).

In The United States District Cour For The District of Columbia

Asociación de Reclamantes

contra

Estados Unidos Mexicanos

Memorandu of the United Mexican States in support
of the
motion to dismiss the complaint

(Petición mexicana que esgrime que el tribunal estadounidense debe desechar la demanda formulada en contra de México)

Int The United States District Court for the District of Columbia

Asociación de Reclamantes
contra
Estados Unidos Mexicanos

Plaintiffs' memorandum in opposition to the montion to dismiss the complaint.

(Memorándum de los demandantes, en el que denotan su oposición a la petición mexicana relativa a que el tribunal estadounidense deseche la demanda formulada en contra de México).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASOCIACION DE RECLAMANTES, et al,
Plaintiffs,

Civil Action No. 81-2299

v.
THE UNITED MEXICAN STATES,
Defendant.

MEMORANDUM OF THE UNITED MEXICAN STATES
IN SUPPORT OF THE
MOTION TO DISMISS THE COMPLAINT

MILBANK, TWEED, HADLEY & MCCLOY
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Washington, D.C. 20006
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASOCIACION DE RECLAMANTES, et al,
Plaintiffs,
v.
THE UNITED MEXICAN STATES,
Defendant.

Civil Action No. 81-2299

STATEMENT OF POINTS AND AUTHORITIES
INTRODUCTION

Plaintiffs here seek monetary damages of more than $193,000,000, plus interest since 1941, from the United Mexican States ("Mexico"). They allege injury as the result of certain public acts by Mexico.

The Complaint is an anomaly. It fails to disclose any law or authority that would enable this Court to award judgment to the plaintiffs. Moreover, Mexico is immune from suit on jurisdictional grounds. Most importantly, Mexico is a sovereign aequal of the United States, and need not answer for its public acts in U.S. courts.

Plaintiffs thus purport to sue a sovereign nation in U.S. courts without the benefit either of substantive claim or jurisdictional basis. Swift dismissal under Rule 12(b), Fed. R. Civ. P., is the only response.

STATEMENT OF FACTS

The plaintiff class alleges that it is made up of descendants, heirs, and successors, known and unknown, of grantees who received 433 grants of land in Texas from Mexico and Spain when those countries were sovereign over that territory. Plaintiffs allege that the rights in the land of their predecessors in interest were protected under the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922, T.S. No. 207, principles of international law and the law of the United States, but that in breach of Treaty obligations the United States and Texas took the land. Mexico sought redress from the United States for those Mexi-

can grantees, and their Mexican heirs and descendants. Pursuant to the U.S.-Mexico Treaty on General Claims, September 8, 1923, 43 Stat. 730, T.S. No. 678 ("1923 Treaty"), each nation could submit the claims of its citizens against the other country to a General Claims Commission for adjudication. Among the claims submitted to the Commission by Mexico were the claims relating to the 433 land grants that are involved in this suit.

The claims Commission never adjudicated any of the 433 claims. The Treaty of Final Settlement of Certain Claims, November 19, 1941, United States-Mexico, 56 Stat. 1347, T.S. No. 980 ("1941 Treaty"), extinguished the unadjudicated claims filed by both countries with the Claims Commission, and all claims that could have been filed with it. Soon after the Treaty was ratified, the President of Mexico issued a decree:

> Whereas it is the duty of the Government to tend to said *claims of our nationals* in order to satisfy them in accordance with the role they played in the recently executed convention with our neighbor country to the north and in accordance with the rules of equity. . . .
>
> Whereas the claims referred to have lost their international character, and have become internal obligations of our government. . . as only one of our many domestic pecuniary responsibilities.
>
> Whereas it is necessary to have a law enacted by the honorable Congress of the Union indicating the apropriate procedures for evaluating the claims referred to in this Decree, to judge them and to ascribe to them the compensation to which they are entitled. . . .
>
> . . .I have found it proper to Order the following:
>
> *Decree*
>
> I. The Secretariat of Finance shall immediately procced to study and prepare a plan, which shall be submitted to the honorable Congress of the Union,

> involving a law for the settlement, valuation, and payment, of the Mexican claims presented to the extinct General Claims Commission. . . .

Oficial Journal [of the Mexican Government], Volume CXXIX, December 31, 1941, Fifth section at 1-2 [Translation from the Spanish] (emphasis added).

Since 1941, Mexico has reaffirmed its intention to provide for the adjudication of the claims of its nationals, and compensation for legitimate claims. Legislation necessary to establish the mechanism to adjudicate and pay the claims has not been submitted to the Mexican Congress.

ARGUMENT

I. THIS CASE MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

In every federal case the jurisdiction of the court must be supported by a statutory grant of jurisdiction and a constitutional basis therefor. *Kline* v. *Burke Constr. Co.*, 260 U.S. 226 (1922). Lacking both statutory and constitutional bases, this suit must accordingly be dismissed.

A. *There Is No Statutory Basis for Federal Subject Matter Jurisdiction.*

Plaintiffs purport to invoke the jurisdiction of this Court under 28 U.S.C. §§ 1330 and 1331. (Complaint, 2) Neither section is relevant in this case. The Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) (hereinafter "FSIA"), which provides the sole jurisdictional basis for suits against a foreign state, precludes suit here. Nor is there any other statutory grant that provides federal subject matter jurisdiction.

1. *The Foreign Sovereign Immunities Act Supplies the Sole Jurisdictional Basis For Suits Against Mexico*

The only statutory bases for subject matter jurisdiction in a suit against a foreign state is the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a). All three Circuits that have confronted the issue have so held. *Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 877-81 (4th Cir. 1981); *Ruggiero v. Compania Peruana de Vapores, S.A.*, 639 F.2d 872, 875-76 (2d Cir. 1981) (Friendly, J.).

In all three cases, the plaintiffs were longshoremen who, in an effort to obtain jury trials on their clair against shipping companies owned by foreign governments, sought to invoke federal jurisdiction under either the federal question or diversity statutes, 28 U.S.C. §§ 1331, 1332, rather than under section

1330, which does not allow for jury trials. In *Ruggiero, supra,* the Second Circuit ruled that "[t]he conclusion is inescapable from the language of the statute that Congress meant § 1330 to be the exclusive means whereby a plaintiff may sue any foreign state. . . ." *Id.* at 875. Moreover, the court expressly rejected the argument that federal question jurisdiction was also available in suits havaing a foreign state as defendant. 639 F.2d at 876. The Third and Fourth Circuits are unequivocally in full accord as to these conclusions. *Rex,* 660 F.2d at 65 ("We conclude. . . that Congress intended all actions against foreign states. . . to be brounght under 28 U.S.C. § 1330(a)."); *Williams v. Shippign Corp. of India,* 653 F.2d at 875.*

2. *This Court Does Not Have Subject Matter Jurisdiction Because Mexico Is Immune as a Sovereign State.*

As a foreign state under section 1603(a) of the FSIA, Mexico is immune from suite in U.S. courts. Section 1604 of the Act provides that "[s]ubject to existing international agreement to which the United States is a party at the time of enactment of this Act a *Foreign state shall be immune from the jurisdiction of the courts of the United States* and of the States except as provided in sections 1605 to 1607 of this chapter." (Emphasis added.)* Mexico is not deprived of immunity by any existing international agreement nor does any of

* The few district court decisions finding jurisdiction over foreign government-owned corporations under the diversity statute, 28 U.S.C. § 1332 (a)(2), were decided prior to *Rex, Ruggiero,* and *Williams. See, e.g., Houston v. Murmansk Shipping Co.,* 87 F.R.D. 71 (D. Md. 1980); *Icenogle v. Olimpic Airways, S.A.,* 82 F.R.D. 36 (D.D.C. 1979). The district courts in these cases recognized that such corporations mignt qualify as "foreign states" under 28 U.S.C. § 1603 and would thus presumably be amenable to suit only under § 1330. Consequently, in an express effort to allow a jury trial, those courts held that jurisdiction could also be invoked under § 1332 (a)(2), on the ground that such corporations could also be considered a "citizen or corporation of a foreign state."

Even these cases, however, fail to support jurisdiction in this case. First, these cases are irrelevant to suits against foreign government themselves, since it is obvious that the foreign government cannot itself be considered a citizen or subject of a foreign state under § 1332 (a)(2). Second, the rationale of the cases has been severely criticized by the Second Circuit in *Ruggiero* and the Fourt Circuit in *Williams,* the latter court stating that the *Icenogle* court had relied on a "hypertechnical analysis" merely in an effort to avoid "a serious constitutional question." *Williams,* 653 F.2d at 880. In short, there is now no persuasive authority that calls into question the conclusion of theree courts of appeals that § 1330 (a) affords the exclusive basis of jurisdiction over cases against foreig states.

* The definition of foreig sovereign immunity enacted in the FSIA should not be applied retroactively to conduct that took place prior to the adoption of the Act. This is especially true with respect to conduct before 1952, because until the adoption by the State Department in that year of the "Tate Letter," embracing the theory of "restrictive immunity," foreign sovereigns were absolutey immune from suits in the U.S. courts. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7-8 (1976) (hereinafter House Report). Where courts have addressed the issue of retroactive application of statutes, they have taken the position that:

[L]egislation must be considered as

the exceptions to sovereign immunity set forth in sections 1605 to 1607 apply. The Court therefore is without subject matter jurisdiction.

This conclusion is necessary as a matter of international law as well as statutory interpretation. It has long been held by U.S. courts that sovereign immunity is an important principle of international law. *See, e.g., Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812). The legislative history of the FSIA establishes that the Act "incorporates standards recognized under international law." House Report at 14. Reference to those standards reveals that no jurisdiction exists with respect to Mexico in this case. *See, e.g.,* Brownlie, *Principles of Public International law* 326-34, 341 (1979).

a. *Mexico is not deprived of sovereign immunity by 28 U.S.C. § 1605.*

None of the five exceptions enumerated in section 1605(a) applies in this case.

Section 1605(a)(1) provides that a foreign state shall not be immune in an action in which it "has waived its immunity either explicitly or by implication. . . ."*

This section is inapplicable because Mexico has clearly done neither in this case. Indeed, the text of the Decree by the President of Mexico of December 31, 1941 (Complaint, Exhibit E) explicitly states that "the claims referred to

> addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Greene v. United States, 376 U.S. 149, 160 (1964) quoting *Union Pac. R. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913). No such clear intention was expressed by Congress with respect to acts taken by foreign sovereigns at a time when U.S. law provided for absolute immunity. *Cf. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation,* 605 F. 2d 648, 654 (2d Cir. 1979).

* According to the legislative history of the Act, an explicit waiver occurs when a foreig state "denounces its immunity" by treaty or by contract with a private party. House Report at 18. An implicit waiver occurs where "a foreign state has agreed to arbitration in another country or were a foreign state has agreed that the law of a particular country should govern a contract." *Id.* However, the submission of claims to an international tribunal established by treaty, such as the General Claims Commission under the 1923 Treaty, does not constitute a waiver of sovereign immunity in U.S. courts. *Cf. Ohntrup v. Firearms Center, Inc.,* 516 F. Supp. 1281 (E.D. Pa. 1981) (no waiver for FSIA purposes where foreign entity agreed to arbitration with a third party in a third country); *Chicago Bridge & Iron Co. v. Islamic Republic of Iran,* 506 F. Supp. 981 (N.D. Ill. 1980) (no waiver for FSIA purposes where foreign entity agreed to arbitrate in a third country). Any waivers under Mexico's agreement to submit the claims to the General Claims Commision under the 1923 Treaty were precisely limited to the terms of that agreemnt, *i.e.,* submission of the claims to the Claims Commission as constitued under the Treaty.

have lost their international character, and have become *internal* obligations." (Emphasis added.) Even the plaintiffs'. account of the events since 1941, *see, e.g.,* Complaint, Exhibits F and G, makes it clear that Mexico regards the matter as one subject to internal resolution only.

Section 1605(a)(2), which creates an exception to sovereign immunity for a case involving "commercial activity" by a foreign state in any place in the United States or having a direct affect in the united States, is inapplicable here. The Act provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603 (d). The definition of commercial activity

> includes cases based on commercial transactions performed in whole or in part in the United States, impor-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States - for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States.

House Report at 17. Plaintiffs' action does not arise out of any activity of this type. Instead, the issues raised by plaintiffs' claims involve public acts of the Mexican government. Plaintiffs' contention that the extinguishment of their claims by the Treaty of 1941 served a "public purpose" (Complaint, 29) illustrates this point. *Demeter v. Consul General of Italy in New York City,* No. 80 Civ. 2288, slip op. (S.D.N.Y. July 10, 1981), an analogous case, involved a claim arising out of Italy's alleged failure to compensate a beneficiary under life insurance policies allegedly taken as a result of the italian Peace Treaty of 1947. The court dismissed the complaint, stating that the FSIA barred the action and that "the alleged acts of the Italian Government in making war reparations and failing to satisfy its treaty obligations in connection therewith do not constitute commercial activity. . . ." *Id.* at 4.

Section 1605(a)(3) creates an exception to immunity in cases in which rights in property taken in violation of international law are at issue, if that property has certain specified contacts with commercial activity carried on in the United States by the foreign state or its instrumentality. There is absolutely no connection betwen the property alleged to be the subject matter of this suit

—*i.e.*, the claims for reimbursement from Mexico · · and any commercial activity by Mexico or any of its agencies or instrumentalities.* Therefore this exception is inapplicable.

Section 1605(a)(4) creates an exception to sovereign immunity in a case in which "rights in property in the United States acquired by succession or gift. . . are in issue" or "rights in immovable property situated in the United States are in issue." The "immovable property" provision applies to rights in real estate, House Report at 20, and is not raised by the Complaint. Plaintiffs' claims, although the allegedly arise from land grants, do not involve any right in land, such as a claim of title. The exception for rights in immovable property is therefore inapplicable.

Nor does plaintiffs' claim involve "rights in property in the Unites States acquired by succession or gift". The Act's legislative history* and its entire structure make clear that this provision applies only when a foreign government acquires by succession or gift. An interpretation of section 1605(a)(4) that provided jurisdiction where property was acquired by succession or gift by the non-foreign-state party would allow property normally outside the exceptions to come within an exception only because of the happensance of transfer by succession or gift.** Such a result would be anomalous.

More generally, no "rights in property" are involved in this case, because Mexico claims no rights in the property alleged to be the subject of the Complaint, *i.e.*, the claims of plaintiffs for compensation from Mexico in connection with the alleged taking of the land of their predecessors in interest. The 1941 Treaty, as stated in the Decree of the President of Mexico of December 31, 1941, changed these claims from those of an "international character" to "internal obligations." Plaintiffs would be the first to contend that they retain whatever "rigths in property" are represented by the claims.

Section 1605(a)(5) creates an exception to sovereign immunity in cases not falling within section 1605(a)(2) in which money demages are sought for "da-

* See the discussion of comercial activity in connection with 1605(a)(2) above.

* The House Report provides:

There is general agreement that a foreign state may not claim immunity when the suit against in relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

House Report at 20.

** For example, imagine property in the United States taken in violation of international law, as in § 1605(a)(3), but without the connection to a foreign state engaged in a commercial activity in the United States also required by § 1605(a)(3). It would be a bizarre interpretation of the FSIA to allow jurisdiction if the non-foreign-state party made a gift of its rights in the property to another non-foreign-state party, when the court would have no jurisdiction otherwise.

mage to or loss of property, occurring in the United Stated and caused by the tortious act or omission" of a foreign state. Plaintiffs have alleged that Mexico "has tortiously failed and omitted to return the value of said claims" to plaintiffs. They have not named any specific tort or suggested any law under which a tort might arise. They have not specified at what point during the 133-year history of events described in the Complaint the alleged tortious act took place.

First, plaintiffs have not claimed that the alleged tortious act or omission occurred in the United States. Both the legislative history and the D.C. Circuit case law clearly establish that the tortious act must take place in the United States. The House Report so states: "the tortious act or omission must occur within the jurisdiction of the United States." House Report at 21. This is in keeping with the purpose of the exception, which, according to the House Report "is directed primarily at the problem of traffic accidents but is cast in general terms. . . ." *Id.* at 20.*

The Court of Appeals for this Circuit held that section 1605(a)(5) applies only when the tort took place in the United States in *Perez v. The Bahamas*, 652 F. 2d 186 (D.C. Cir.), *cert. denied*, 102 S. Ct. 326 (1981). It that case, plaintiff attempted to recover for personal injuries sustained when the fishing vessel on which he was a passenger was fired at in Bahamian territorial waters by Bahamian government gounboats. The court held that the Act barred jurisdiction, stating that "the thort did not occur in the United States. The Bahamas is immune from suit in our courts for torts occurring outside the United States." 652 F.2d at 189.

Even if section 1605(a)(5) created an exception from immunity for torts occurring outside the U.S., but causing damage or loss to property in the U.S., it would not apply in this case. Section 1605(a)(5)(A) states that the exception does not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." Whatever the precise tort of which plaintiffs complain, the facts set forth in the Complaint reveal that the Government of Mexico has made a series of policy decisions about how best to proceed in the matter of the claims of its nationals for compensation for land allegedly taken from them or their predecessors in interest. As this Court recognized in *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), the discretionary act exception of section 1605(a)(5)(A) corresponds to that found in the Fede-

* If this section were not restricted to torts occurring within the United States, § 1605(a)(5) would provide U.S. subject matter jurisdiction over a claim involving a tort taking place anywhere in the world, as long as it resulted in *any* damage to or loss of property in the United States. The effect of the tort on the property would not have to be "direct", as it would in connection with an act taking place outside the U.S. under § 1605(a)(2). Even a claim of indirect, insignificant damage to or loss of property in the U.S. would give U.S. courts jurisdiction over an alleged tort, not connected with a commercial activity, taking place anywhere in the world. This would, of course, restrict foreign sovereign immunity more with respect to noncommercial activities than with respect to commercial activities, which is the opposite of what Congress intended in the Act. *See, e.g.*, 28 U.S.C. § 1602, "Findings and declaration of purpose," and House Report at 7.

ral Tort Claims Act, 28 U.S.C. § 2680(a), which has been held to preserve the sovereign immunity of the United States with respect to any act in which "there is room for policy judgment and decision." *Dalehite v. United States*, 346 U.S. 15 (1953). Mexico's actions with respect to plaintiffs' claims have been made entirely on the basis of judgments as to appropriate national policy. Therefore Mexico is immune in U.S. courts from any tort claim based on these actions.

b. *Mexico Is Not Deprived of Immunity by Any Applicable International Agreement.*

Section 1330(a) also provides for an exception to sovereign immunity as required "under any applicable international agreement." Section 1604 makes immunity "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act."

Plaintiffs have not alleged the existence of any provision in any international agreement that would deprive Mexico of sovereign immunity with respect to this action, nor is there any.

3. *Even If the Foreign Sovereign Immunities Act Were Not the Sole Jurisdictional Basis for Actions Against a Foreign State, There Would Still Be No Federal Question Jurisdiction Here.*

a. *Plaintiffs Erroneously Claim That Their Case Presents a Federal Question.*

Evidently disregarding the *Rex*, *Williams* and *Ruggiero** holdings that section 1330(a) provides the sole basis for subject matter jurisdiction in actions against a foreign state, the plaintiffs seek to invoke the jurisdiction of this Court under the federal question statute, 28 U.S.C. § 1331. The plaintiffs have not explained how their case presents a federal question. Obviously their case does not arise under the Constitution or any federal law, since neither applies to Mexico or is in any may relevant to the plaintiffs' claims.

Apparently the plaintiffs believe that their claim arises under a treaty of the United States, since they allege that Mexico, by consummating the 1941 Treaty, appropriated the plaintiffs' claims and somehow became liable to reimburse or compensate the plaintiffs. Complaint, 29. This reasoning is spurious.

b. *This Case Does Not "Arise Under" the 1941 Treaty.*

* *Rex v. Cia. Peruana de Vapores, S.A.*, 660 F. 2d 61 (3d Cir. 1981); *Williams v. Shipping Corp. of India*, 653 F. 2d 875 (4th Cir. 1981); *Ruggiero v. Compania Peruana de Vapores, S.A.*, 639 F. 2d 872 (2d Cir. 1981).

Just a few months ago, this Court, in dismissing a case in which the plaintiffs sought to invoke jurisdiction under various treaties, employed reasoning and language that is equally applicable to, and dispositive of, this case. *Hanoch Tel-Oren v. Libyan Arab Republic,* 517 F. Supp. 542 (D.D.C. 1981). In that case, this Court succinctly ruled:

> In maintaining that their actions indeed state claims for recovery under treaties and the law of nations, plaintiffs ignore the fundamental proposition, articulated one hundred fifty-two years ago by Chief Justice Marschall in *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829), that treaties must provide expressly for a private right of action before an individual can assert a claim thereunder in federal court.

Id at 546. In this case, the 1941 Treaty does not mention that private rights of action may be asserted thereunder, nor do the plaintiffs suggest that it does so.

Unless a treaty creates an express right to sue a government for enforcement thereof, o "treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." *Canadian Transport Co. v. United States,* No. 77-1693, slip op. at 22 (D.C. Cir. Sept. 5, 1980). The same conclusion was reached by the Second Circuit in *Dreyfus v. Von Finck,* 534 F.2d 24 (2d Cir.), *cert denied,* 429 U.S. 835 (1976). In that case, the court held that tere could be no section 1331 jurisdiction under a treaty:

> Indeed, even where a treaty is self-executing, Federal jurisdiction under § 1331 will not lie were it is not provided forin the treaty.

534 F.2d at 30 (citations omitted).

Since the 1941 Treaty does not create private rights of action, the principles enunciated above mandate that this case be dismissed. Indeed, even were there no persuasive precedents to the effect that private rights of action must be explicity provided for in treaties, the logic of the "arising under" jurisdiction is to the same effect. As one federal district court recently noted,

> [t]he problem often arises that when dealing with federal question jurisdiction based upon

> a treaty, the claim itself, the right of recovery, is not derived from the treaty. . . . '[I]t is rare that the relation of a treaty to the plaintiff's claim will be suficiently direct to satisfy the test of "arising under". The principles that have developed as to the meaning of those words ordinarily require rejection of the argument that a case arises under a treaty.'

Chapalain Compagnie v. Standard Oil Co. (Indiana), 467 F. Suup. 181, 184 (N.D. Ill. 1978), *quoting* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3563 at 424 (1975).

• The most frequently encountered types of cases involving "arising under" jurisdiction are those in which a federal constitutional or statutory provision defines or creates the cause of action, *see, e.g., American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), or in which interpretation of a federal provision is required, *see, e.g., Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936). This case falls within neither type of "arising under" jurisdiction. It neither involves a claim created under the 1941 Treaty, nor requires interpretation of that treaty. As Justice Cardozo, speaking for a unanimous court, said in the often-quoted case of *Gulley v. First National Bank in Meridian, supra*, "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." 299 U.S. at 115.

Even a moment's analysis reveals that the 1941 Treaty did not create or define the rights asserted by the plaintiffs here. The plaintiffs allege that, because the Mexican government entered into and obtained value under the treaty, in thereby became liable to the plaintiffs. However, any obligation of the Mexican government arose, if at all, under some rule of law other than the 1941 Treaty. To conclude otherwise would mean that a case alleging an unconstitutional taking of property by a municipal ordinance "arises under" the ordinance itself. But surely the Constitution creates the right to be compensated for property taken, and thus the claim is founded directly upon and "arises under" the Constitution. *See, e.g., City Railway v. Citizens' Street Railroad*, 166 U.S. 557, 562-64 (1897). Similary, the plaintiffs' alleged right to compensation from Mexico does not arise under the 1941 Treaty.

It is equally clear that this case does not present the second type of "arising under" jurisdiction, because it will not "dra[w] into question the construction of the treaty." *See, Skokomish Indian Tribe v. E.L. France*, 269 F.2d 555, 558 (9th Cir. 1959). *Accord, League to Save Lake Tahoe v. B.J.K. Corp.*, 547 F.2d 1072, 1074 (9th Cir. 1976). Here, there is no controversy over the 1941 Treaty. Its validity is not in question. There is no particular construction of the treaty that would enable the plaintiffs to vindicate their claims, nor do plaintiffs ask this Court to interpret any provision of the treaty. In sort, no formulation of the plaintiffs' claim is possible such that it can be said to "arise

under" the 1941 Treaty.*

B. *There is No Constitutional Basis for Federal Subject Matter Jurisdiction.*

Article III of the U.S. Constitution extends the judicial power of the federal courts to certain enumerated classes of disputes. U.S. Const. art. III, § 2, cl. 1. In confining jurisdiction to those cases only, the Constitution articulates a basic principle of American jurisprudence: the jurisdiction of the federal courts is limited.

At bottom, this case involves claims that citizens of Mexico are alleged to have, or have had, against their own government. None of Article III's grants of federal jurisdiction applies to a case involving aliens and a foreign government as parties.

The Constitution's diversity grant will clearly not support jurisdiction in such a case. Article III nowhere mentions a case between two aliens. Moreover, the Supreme Court held in a series of cases in the early years of the Republic that the judicial power under the Constitution does not extend to suits by aliens (such as the Mexican plaintiffs here) against other aliens (such as Mexico as defendant here). *See Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); *Hodgson v. Bowerbank*, 9. U.S. (5 Cranch) 303, 304 (1809); *Montalet v. Murray*, 8. U.S. (4 Cranch) 46 (1807).

Nor can jurisdiction in this case be based on Article III's extension of judicial power to cases "arising under this Constitution, the Laws of the United States, and Treaties. . . ." In neither the language nor the logic of this grant is there to be found any basis for suits by aliens against a foreign government.

This conclusion is confirmed by a recent Second Circuit case that is directly relevant to —and highly persuasive concerning— this case. *See Verlinden B. V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3527 (U.S. Jan. 11, 1982) (No. 81-920). The Court of Appeals there found itself confronted with the issue whether a "foreign plaintiff can sue a foreign state ir a federal court for breach of an agreemen not governed by federal law." *Id* at 233.* After an "exhaustive examination of the context,

* It should not be surprising, therefore, that during the more than 100 years since the lower federal courts were granted this type of jurisdiction, there have been only a handful of ca which jurisdiction has been successfully invoked as "arising under" a treaty. Moreover, it is ast in part due to the prerequisites of federal question jurisdiction that there has never be ported federal case arising under the 1941 Treaty. All of the reported cases that address the i in the context of treaties involving Mexican lands have found no federal question jurisdiction. *See, e.g., Hidalgo County Water Control & Improvement District v. Hedrick*, 226 F.2d 1 (5th Cir. 1955), *cert. denied*, 350 U.S. 983 (1956); *Crystal Springs Land & Water Co. v. City of Los Angeles*, 82 F. 114 (C.C.S.D. Calif. 1897), *affd., 177 U.S. 169 (1900). See also Crystal springs Land & Water Co. v. City of Los Angeles*, 76 F. 148, 150-53 (C.C.S.D. Calif. 1896) (arising under a predecessor statute to 28 U.S.C. § 1331 *i.e.*, the Act of March 3, 1875, 18 Stat. 470).

* The same issue is now pending in this Circuit. *See Maritime International Nominees Establishment v. Republic of Guinea*, appeal docketed, No. 81-1073 (D.C. Cir., January, 1981).

language and history of Article III," the Second Circuit concluded that the Constitution denied jurisdiction to the federal courts to hear suits under section 1330(a) by aliens against foreign states. *Id.* For the same reasons, this case —which likewise involves foreign plaintiffs suing a foreign state - must also be dismissed.**

II. THIS CASE MUST BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.

Because subject matter jurisdiction is absent in this case statutory personal jurisdiction is absent as well. 28 U.S.C. § 1330(b). The Act provides that personal jurisdiction over a foreign sovereign exists only if that state is subject to suit under section 1330(a), *i.e.*, only if an exception to sovereign immunity set forth in sections 1605-1507 applies. Since none of those exceptions applies, the Court can have no personal jurisdiction over Mexico.

Even if plaintiffs, allegations were minimally sufficient to satisfy the requirements of section 1330(b), however, that provision is insufficient alone to sustain personal jurisdiction in this case. "In United States jurisprudence, the outer boundaries of a court's authority to proceed against a particular persons* or entity is [sic] set by a due process measure, imposed on action at the national level by the Fifth Amendment. . . ." *Steinberg v. International Criminal Police Organization,* No. 80-1336, slip op, at 7 (D.C. Cir. Oct. 23, 1981) (citations omitted). Subjection of Mexico to personal jurisdiction here would violate due process.

Since *International Shoe Co. v. Washington,*** the Supreme Court has held that due process requires that a defendant be subject to suit only where he has certain minimum contacts. 326 U.S. 310, 316 (1945). One function performed by the requirement of minimum contacts, typically described as "fairness," is that it "protects the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980).

Delineation of the relevant contacts in this case requires, in turn, focus on the appropriate forum. *Texas Trading*, 647 F.2d at 314. In this case, the fo-

** The fact that some plaintiffs in this case are United States citizens will not enable this Court to retain jurisdiction as to the claims, for there is no independent basis of jurisdiction to support those claims.

* As a foreign state, Mexico is a "person" within the meaning of the due process clause, and constitutional due process analysis must be applied to a suit against it. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 313 (2d Cir. 1981).

** *International Shoe* and most of the cases interpreting it were decided not under the fifth amendment's due process clause but under the fourteenth amendment's. The same analysis has been applied under the fifth amendment, however, with the additional caveat that the assertion of personal jurisdiction "must be applied with caution, especially in an international context." *Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972).

rum within wich contacts must be evaluated is the District of Columbia.* In applying the minimun contacts test, "courts should undertake an analysis of the quality and nature of an activity in relation to a forum state." *Textile Museum v. F. Eberstadt & Co.*, 440 F. Supp. 30, 32 (D.D.C. 1977). Mexico's contacts with the District of Columbia, as alleged in plaintiffs' Complaint, have benn few and far between: *i.e.*, (1) signing a treaty in 1923 (§ 18), (2) negotiating with the United States (§ 22-e), (3) filing claims with the Commission (§ 22-f), and (4) signing a treaty in 1941 (§ 27). These alleged contacts were too long ago and far away to be of any weight today. Furthermore, all of these contacts were made long before the FSIA's 1977 effective date, a date chosen in order to give adequate notice to foreign states. House Report at 6632. Most importantly, those contacts all fulfilled diplomatic purposes and apparently took place on diplomatic premises.

The privileges and immunities inherent in those purposes and premises, *see* 7 M. Whiteman, *Digest of International Law*, §§ 33-39 (1970), require that these contacts not be considered for purposes of fulfilling the jurisdictional test.*

The Supreme Court has recently reminded us that the concept of minimum contacts acts to help ensure not only fairness but also the orderly administration of the laws. *World-Wide Volkswagen* 444 U.S. at 294. Consequently,

> [t]he relationship between the
> defendant and the forum must be such
> that it is 'reasonable. . . to
> require the [defendant] to defend
> the particular suit which is brounght

* Service purportedly made under § 1608, which authorizes world-wide service of process in FSIA cases, does not argue persuasively to the contrary. *But see Texas Trading v. Federal Republic of Nigeria*, 647 F.2d at 314. Although nationwide service of process provisions in other federal statutes, *see, e.g.*, Securities Act of 1933, 15 U.S.C.A. § 77v (1981), have from time to time been held to authorize a federal "aggregate U.S. contacts" test for testing amenability to suit, *see, e.g., Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998-1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), those provisions occur in statutes embodying substantive federal policies. No such federal policy is involved in this case, since plaintiff's claims for relief do not arise under the Constitution, laws or treaties of the U.S. Noting that the nationwide service test, "which has attracted only limited support in federal question cases, appears to have made no mark at all in cases that do not arise under federal law," the Court of Appeals for this Circuit has rejected it. *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1038-39 (D.C. Cir. 1981). *But cf. Steinberg v. International Criminal Police Organization*, No. 80-1336, slip op. at 10-11 (D.C. Cir. Oct 23, 1981); *Gilson v. Republic of Ireland*, 517 F. Supp. 477, 483-84 (D.D.C. 1981).

* Mexico's alleged contacts with other areas of the United States suffer the same defect. Of those post-FSIA contacts alleged, only one instance of physical presence — a diplomatic meeting in New York City — is alleged to have ocurred. Complaint, 43-44. Communication by mail, telephone, telex, or telegraph, such as that alleged in 52, is not activity having a substantial contact with the United States. *See Gilson v. Republic of Ireland*, 517 F.Supp. at 483. Because Mexico's alleged contacts with the forum and the United States are both insubstantial and diplomatic, subjection of Mexico to the burden of trial in this Court would be patently unfair, and would thus constitute a violation of due process.

> there' . . . . Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in the light of other relevant factors. . . .

Id at 292 (citations omitted). *See also Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

Those other factors have traditionally included "the forum State's interest in adjudicating the dispute. . . ; the plaintiff's interest in obtaining convenient and effective relief. . . ; the interestate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantial social policies. . . ." *World-Wide Volkswagen,* 444 U.S.' at 292. (citations omitted). In this case, none of these factors —considered separately or in the aggregate - outweighs the unfairness to Mexico of litigating in a distant and inconvenient forum.

As the Supreme Court also said in *World-Wide Volkswagen,* even if there is no unfairness, personal jurisdiction may still be divested in the absence of foreseeability.

> [T]he forseeability that is critical to due process analysis is not the mere likelihood that a product will find its may into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

Id. at 297.

The contacts of Mexico's agencies and instrumentalities alleged in the Complaint (58) fail the "foreseeability" test because they are unrelated to plaintiffs' claims for relief. The Court of Appeals for this Circuit has expressed strong doubts as to whether the existence of forum contacts unrelated to the claims alleged in a complaint "will make it reasonable" to require a defendant to defend those claims in that forum. *Donahue v. Far Eastern Air Transport Corporation,* 652 F.2d at 1037. Furthermore, "[a]lthough the contact may be directly related to the transaction at issue, . . . the telling question is whether that contact was designed to derive a benefit from the forum state which would justify the assertion of jurisdiction," *Willis v. Willis,* 655 F.2d 1333, 1339 (D.C. Cir. 1981) - a requirement plainly not met here.

Because the alleged contacts of Mexico's agencies and instrumentalities are not such that Mexico could reasonably anticipate being "haled into court" in connection therewith, due process's requirement of "reasonableness" prevents jurisdiction from attaching. Only if plaintiffs are remitted to their proper forum does the legal system have that degree of predictability "that allows potential defendants to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them liable to suit." *World-Wide Wolkswagen,* 444 U.S. at 297.

III. THIS CASE MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Complaint does not contrain "a short and plain statement of the claim showing that the pleader is entitled to relief. . ." Fed. R. Civ. P. 8(a)(2). Instead, Mexico confronts bare assertions of legal liability – *e.g.*, plaintiffs' declaration that as a result of Mexico's signing of the 1941 Treaty, it "became obligated to pay just, effective and prompt compensation. . . ." Complaint, 29. In order to state a claim, plaintiffs must go beyond such conclusory allegations and demonstrate not only that a legal obligation was created by the 1941 Treaty, but also that it is enforceable by these plaintiffs in this Court. Even when plaintiffs' allegations are construed in the light most favorable to them, it is apparent that no obligation arose under any statute or the Treaty of 1941. Furthermore, statutes of limitations bar any tort or contact claims that might be inferred.

A. *The Act of State Doctrine Requires This Court to Abstain from Revierwing the Legality of Mexico's Acts.*

The Complaint alleges a long series of acts and omissions by Mexico occurring in the course of its diplomatic relations with the United States. Presumably, plaintiffs consider these allegations essential to their claim that Mexico has breached some fiduciary duty or "other legal obligations' to the plaintiffs.

The authority of United States courts to review the lawfulness of acts and omissions by foreign governments has been sharply circumscribed since the Supreme Court's decision in *Underhill v. Hernandez,* 268 U.S. 250 (1897), in which the Court rendered the classic statement of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained

> through the means open to be availed of by sovereing powers as betwen themselves.

Id. at 252.

Because the Constitution designates the President as the sole organ of the United States in foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the doctrine has evolved to express "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itsel and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

Judicial involvement in the resolution of plaintiffs' claims here would interfere with the conduct of U.S. foreign affairs by resurrecting an issue between Mexico and the United States that the two countries wished to put behind them; by disregarding the means established by treaty for settling the claims; by deterring other nations from entering into treaties with the United States; and by intruding substantially into Mexico's governmental affairs. In short, this case is a classic example for application of the act of state doctrine.*

1. *All of the Prerequisites Established by the Supreme Court for Application of the Act of State Doctrine Are Met Here.*

Justice Harlan, writing for the Court in *Sabbatino*, concisely articulated the Court's holding:

> [R]ather than laying down or reaffirming an inflexible and all-encompassing rule

* The Court's attention is invited to the fact that plaintiffs allege no breach of international law by Mexico. If international law is not implicated in this case, then the "Hickenlooper Amendment," 22 U.S.C. § 2370(e)(2), does not preclude application of the act of state doctrine. That statute explicitly excepts from its coverage "any case in which an act of state is not contrary to international law . . . ." An act of state not governed by international law is not "contrary to international law." Even if international law does apply here, however, a taking of these alleged claims would not violate it, since nothing in the Complaint suggests that the taking was retaliatory or discriminatory. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968), *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981). Furthermore, the Amendment's legislative history conclusively demonstrates that it should be narrowly construed as applicable only to situations in which property confiscated by a foreign state, or the proceeds of such property, subsequently finds its way into the United States. *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F.2d 394, 399-402 (2d Cir. 1970), *vacated on other grounds*, 400 U.S. 1019 (1971). This situation is not presented here. *See also Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980).

> in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428. The facts alleged by plaintiffs here place this case squarely within the holding.

a. *The Acts in Mexico Alleged by Plaintiffs Are Governmental Acts.*

Only governmental acts are entitled to the protection of the act of state doctrine. *Sabbatino*, 376 U.S. at 428. Plaintiffs' allegations demonstrate the governmental nature of the alleged actions of Mexican officials in the case.

Plaintiffs allege a series of meetings in government offices with Mexican officials purporting to act in their official capacity, the Decree included as Exhibit E to the Complaint describes itself as having been published in the manner of official documents in Mexico; the correspondence between officials of the Mexican government and plaintiffs or their representatives was entirely of an official character. The Attorney General of the United Mexican States confirms that all acts and omissions to date by persons purporting to act on behalf of the government of Mexico constituted exercises of Mexican sovereignty. Affidavit of the Attorney General of the United Mexican States, dated January 29, 1982 (Exhibit A hereto). Plaintiffs themselves have effectively conceded the governmental character of these alleged acts and omissions by alleging repeatedly that Mexico took and used the alleged claims "for its own *public* purposes. . . ." (Emphasis added.) Complaint, § 1,29,63,77, 84, 91, 98, and 105.

b. *The Alleged Taking of Plaintiffs' Alleged Claims, Numerous Related Acts and the Property Allegedly Confiscated Were Within the Territory Of Mexico.*

The essence of the breach of fiduciary duty and commission of tortious conduct alleged by plaintiffs is that "[on]otwithstanding the continues effors of the heirs to resolve this matter short of litigation, to date no steps have been taken by Mexico to bring about . . . payment." Complaint, §§ 56. This alle-

ged failure to act necessarily occurred, if at all, where the government of Mexico is located, *i.e.*, within the territory of the United Mexican States.

Virtually all of the acts and omissions alleged to constitute unlawful conduct also took place, if at all, in Mexico. The Decree set forth in Exhibit E to the Complaint was "[g]iven in the palace of the Federal Executive Power, in Mexico City . . . ." The letters described in paragraphs 31 and 32 of the Complaint were drafted and issued in Mexico, in the course of the performance by Mexican government officials of official duties in that country. Similaty, the official reports prepared and disseminated by the Mexican Treasury Department (Complaint, § 33); the various meetings in Mexico with Mexican officials (Complaint, § 35-40, 44, 46-52); the legal conclusions concerning these claims reached withing the Mexican government (Complaint, § 45); and the alleged failure on the part of the Mexican government to draft legislation or submit it to the Mexican Congress (Complaint, § 55) are acts that necessarily took place in Mexico. Mexico's alleged decision on whether to honor plaintiffs' alleged claims, any decision on the issuance of substantial sums from the Mexican Treasury, and the deliberative process that would precede any such decision all necessarily occurred, if at all, within Mexico's borders.

The situs of the claims alleged by plaintiffs is also Mexico. In the context of the act of state doctrine, the courts have concluded that the situs of a debt is generally within the jurisdiction that has power to enforce or collect it, usually the place where the debtor is located. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *Cert. denied* 393 U.S. 924 (1968). *See Menendez v. Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir.), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) [hereinafter *Dunhill*]; *United Bank Ltd. v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). In this case only the government of Mexico can cause payment to be made in satisfaction of plaintiff's alleged claims, and only within Mexico.

All territorial requirements of the act of state doctrine are, as a result, fully satisfied on the facts alleged by plaintiffs.

c. *This Case Is Distinguishable for Act of State Purposes from Letelier v. Republic Of Chile.*

This case is distinguishable from *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) because the defense of foreign sovereign immunity is avbailable to Mexico here. Even if this were not so, however, *Letelier* would not preclude applicability of the act of state doctrine in the circumstances of this case.

The doctrines of foreign sovereign immunity and act of state have different purposes and are analytically distinct. While both doctrines have roots in a

policy of respect for the sovereignty of other countries, *International Association of Machinists & Aerospace Workers v. Organization of the Petroleum Exporting Countries*, 649 F.2d 1354, 1359 (9th Cir.), *cert. denied*, 50 U.S.C.L.W. 3531 (U.S. Jan. 11, 1982) (No. 81-645) [hereinafter *IAM*], sovereign immunity is a doctrine of jurisdiction which respects the historical "prerogratrive right not to have sovereign property subjec to suit . . . ." *Sabbatino*, 376 U.S. at 438. By contrast, "the act of state doctrine merely thes the court what law to apply to a case . . .," requiring "that the acts of a sovereign foreign nation committed in its own territory be accorded presumptive validity." *Dunhill*, 425 U.S. at 726 (Marshall, J., diseenting).*

The legislative history of FSIA amply demostrates that Congress did not intend to abolish or restrict the act of state doctrine in adopting that statute. *See, e.g.*, House Report at 6619 n.1 ("[t]he Committee has found it unnecessary to address the act of state doctrine in this legislation . . . ")

Consequently, even if this Court holds Mexico amenable to suit under the FSIA, the act of state doctrine still precludes this Court from reviewing the alleged acts of Mexico.

2. *Judicial Scrutiny of Mexico's Acts in This Case Would Create the Precise Dangers That the Act of State Doctrine Is Designed To Avoid.*

The wisdom and necessity of applying the act of state doctrine in this case is underscored by the dangers that would be created for the effective conduct of the foreign relations of the United States if the Court were to review Mexico's acts.

a. *The Executive Branch Has Chosen a Method for Terminating the Role of the United States Regarding These Claims and the Courts Should Not Substitute Their Judgment for the Executive's.*

The Treaties of 1923 and 1941 both recite their intention to promote a full and complete settlement of these claims as between the two governments concerned. *See* Complaint, Exhibit A (preamble) and Exhibit D (preamble). This suit, if permitted to go forward, could resurrect these claims as an issue between the United States and Mexico, thereby frustrating the intent of the treaties. Further, the treaties not only seek to remove a source of friction between the parties to them but also specify the mechanisms for achieving this re-

* This Court has also distinguished clearly between the two doctrines. *See Libyan American Oil Co.*, 482 F. Supp. at 1179. *See also First National Bank of Boston v. Banco Nacional de Cuba*, 658 F.2d at 895, 900 n.6 (2d Cir. 1981); *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., Inc.*, 652 F.2d 231, 238-239 (2d Cir. 1981); *IAM*, 649 F.2d at 1359-1360.

sult. Lawsuits in U.S. courts were not the mechanism chosen. For this Court to entertain such suits against Mexico would be, in effect, to abrogate or rewrite the 1941 Treaty and to undermine the ability of the United States to speak with one voice in foreing affairs — precisely the danger that the of state doctrine is designed to avoid.

The Supreme Court has held that international agreements to which the United States is a party "should be interpreted consonantly with the purpose of the compact to eliminate all possible sources of friction between" the parties. *United States v. Pink*, 315 U.S. 203, 225 (1942) (citations omitted). Construction of the 1923 and 1941 Treaties as permitting private suits against Mexico on these alleged claims would contradict their purpose by disregarding the Executive's intent to terminate any involvement by the United States government in these claims.

b. *Judicial Scrutiny of Mexico's Acts in This Case Could Deter Other Nations from Entering into Treaties with the United States.*

As the Second Circuit noted in *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 112 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966), "[t]here is a long history of governmental action compensating our own citizens out of foreign assets in this country for wrongs done them by foreign governments abroad." The frequent use of this tool in the resolution of international crises demonstrates the necessity for its unimpeded availability for the conduct of U.S. foreign policy.

The Supreme Court has twice considered the act of state doctrine in the context of such schemes. *See United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203. These cases also involved U.S. recognition of foreign governments, a circumstance alleged by plaintiffs to be present in this case as well. Complaint, § 14-17. In each of these cases, the Court accorded extraordinary deference to the decision made by the Executive Branch. These holdings require dismissal of this case.

If this Court were to subject the acts of Mexico to its review, henceforth, every foreign state nearing an agreement with the United States on the handling of claims —perhaps as a condition to the recognition of its government by the United States— would have to fear regulation by U.S. courts. This prospect could hardly be expected to encourage foreign states to seek such agreements. Insertion of this additional complication into the dificult process of resolving international conflict through the establishment of claims resolution mechanisms is highly undesirable. Application of the act of state doctrine avoids the problem.

3. *U.S. Public Policy Requires U.S. Courts to Refrain from Inquiring into Mexico's Acts of State.*

U.S. courts have generally given effect even to acts of foreign states purporting to confiscate property located in the United States, where the policy aims of the United States are thereby anhanced. *United States v. Belmont; United States v. Pink.* Here U.S. policy and respect for the acts of state of Mexico are entirely consistent. The policy of the United States, as expressed in the treaties of 1923 and 1941, is to promote amicable relations with Mexico. These international agreements thus have the same purpose with regard to Mexico as did the Litvinov Assignment with regard to the U.S.S.R. involved in *Belmont* and Pink. This Court should be guided, as was the Supreme Court in those cases, by the desire of the United States to minimize impediments to friendly relations with Mexico. Since an inquiry by the Court into Mexico's acts would have the opposite effect, the inquiry should be precluded. Moreover, this Court is being asked only for a decision of limited scope. In contraste to the circumstances in *Belmont* and *Pink*, this Court is not being asked to enforce any alleged title to these claims on the part of Mexico. The application by this Court of the act of state doctrine will result only in preserving the status quo. Mexico's posture vis-a-vis these alleged claims will be a matter to be resolved in accordance with its own law. The power of this Court will in no sense be implicated in any substantive endorsement of Mexico's acts of omissions.

The Action is Barred by the Statute of Limitations.

The plaintiffs seeks damage for an alleged "taking" that occurred in 1941. Even if their Complaint stated a claim, that claim would be barred by the applicable statute of limitations.

Mexico has demonstrated that, contrary to plaintiffs' allegations, there is no basis in federal law for the cause of action alleged in this Complaint. There is consequently no specifically applicable federal statute of limitations. Under these circumstances, the forum state supplies the limitations rule "for analogous types of actions." *Chevron Oil Co. v. Huson,* 404 U.S. 97, 104 (1971); *International Union, United Automobile Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 703-04 (1966). *See also, Schmidt v. Interstate Federal Savings & Loan Association,* 74 F.R.D. 423, 428 (D.D.C. 1977).

Since the purported claim in this case is utterly without precedent, the appropriate District of Columbia limitations statute is the one now codified as D.C. Code Ann. § 12-301(8) (Michie 1981), establishing a three-year limitations period for actions the limitation of which "is not otherwise specially prescribed." Since plaintiffs' purported claim arose, if at all, over 40 years ago, whatever statute of limitations is looked to, plaintiffs' action has been barred for decades.

CONCLUSION

For the reasons stated above, the case should be dismissed.

Respectfully submitted,

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ASOCIACION DE RECLAMANTES, ET AL.,
PLAINTIFFS,
V.
THE UNITED MEXICAN STATES,
DEFENDANT.
CIVIL ACTION NO. 81.

DECLARACION OFICIAL DEL PROCURADOR GENERAL DE LA REPUBLICA MEXICANA

OSCAR FLORES, oficialmente declara y manifiesta:

1.- Que es el Procurador General de la República.

2.- Que como parte de sus funciones oficiales es el Consejero Jurídico del Gobierno de los Estados Unidos Mexicanos. De acuerdo con el Artículo 102 de la Constitución Política de los Estados Unidos Mexicanos se encuentra dentro de sus facultades expedir declaraciones oficiales en nombre del Gobierno mexicano en cuestiones de derecho.

3.- Entre las cuestiones de derecho sobre las que tiene facultad de expedir declaraciones oficiales en nombre del Gobierno mexicano se encuentran aquéllas que se refieren a la amplitud de las facultades delegadas por dicho Gobierno a sus funcionarios y empleados. Que también se encuentra dentro de dicha facultad expedir declaraciones oficiales acerca de si los actos u omisiones de funcionarios o empleados del Gobierno mexicano se encuentran dentro del ámbito de las facultades que les son delegadas.

Que ha revisado la demanda registrada en nombre de Asociación de Reclamantes, et al V. the United Mexican States. No. 81-2299 ante la Corte de Distrito de los Estados Unidos para el Distrito de Columbia y ha ordenado una revisión de la información en poder del Gobierno de los Estados Unidos Mexicanos que se refiere a los alegatos contenidos en el mismo y que ha tomado en consideración los resultados de la revisión de dicha información.

Como resultado de tales consideraciones ha encontrado que y declara con su carácter de Procurador General de la República que todos los actos y omisiones por funcionarios o empleados de los Estados Unidos Mexicanos que pudieran haber ocurrido en conexión con las reclamaciones alegadas por los actores en el caso anteriormente referido se encuentran dentro de las funciones y

serían actos oficiales del Estado mexicano realizados en su representación y en el ejercicio de su autoridad soberana.

Por lo tanto yo, Oscar Flores, firmo la presente de mi puño y letra y estampo el sello de mi oficina.

México, D. F., a 29 de enero de 1982.

OSCAR FLORES
PROCURADOR GENERAL DE LA REPUBLICA MEXICANA.