FEDERAL DISTRICT STATES
FEDERAL DISTRICT
CITY OF MEXICO
EMBASSY OF THE UNITED
STATES OF AMERICA
SS

I *Ronald A. Dwight,* Vice Consul ,of the United States of America at Mexico, D.,F., Mexico, duly commissioned and qualified do hereby certify that *Oscar Flores Sanchez* whose true signature and seal are, respectively subscribed and affixed to the foregoing document, was on the .29 day of January ,19 82 the date thereof Attorney General, Mexico, D.F., Mexico

_____

_____

_____

duly commissioned and qualified to whose official acts faith and credit are due.

For the contest of the foregoing document I assume no responsibility.

IN WITNESS WHEREOF I have hereunto set my hand and affixec the seal of the Consular Service of the United States of American at Mexico, D.F., Mexico, this 29th day of January ,19 82

Vice Consul of the United States of America

MEX/NOT-4 (8/80) 5,000

INTERNATIONAL TRANSLATION CENTER, INC.

AFFIDAVIT

BEFORE ME, the undersigned Notary Public in and for the District of Columbia, United States of America, there did appear personally, Lawrence B. Hanlon, who, after having been duly sworn in accordance with the law, declares the following:

1. I, the undersigned Lawrence B. Hanlon, am a professional translator amployed by the International Translation Center, Inc., 1346 Connecticut Avenue, N.W., Washington, D.C. 20036, and possess full knowledge of the English and Spanish languages.

2. I do hereby certify that the translation attached herewith is, to the best of my knowledge and belief, a true, correct and complete English translation of the original Spanish language document also attached herewith.

Lawrence B. Hanlon

District of Columbia, ss:
Subscribed and sworn before me
on this day of 1982.

Notary Public

UNITED MEXICAN STATES
Office of the Attorney General
of the
United Mexican States

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

OFFICIAL DECLARATION OF THE ATTORNEY GENERAL REPUBLIC OF MEXICO

OSCAR FLORES, officially declares and states:

1.- That he is the Attorney General of the Republic

2. That as part of his official duties he serves as the Legal Counsel to the Government of the United Mexican States. In accordance with Article 102 of the Political Constitution of the United Mexican States, the Attorney General is, within the scope of his powers, authorized to issue official declarations in the name of the Mexican Government in matters of law.

3.- That such matters of law in which the Attorney General has the authority to issue official declarations in the name of the Mexican Government include those that referto the extent of powers delegated by said Government to its officials and employees. That the authority also includes that of issuing official declarations relating to the question of whether the acts or failures to act on the part of officials or employees of the Mexican Government fall within the limits of authority that have been delegated to said officials or employees.

That the Attorney General has examined the complaint filed in the name of Asociación de Reclamantes, et al. v. the Unites Mexican States, Civil Action No. 81-2299 pending in U.S. District Court for the District of Columbia and has ordered a review of the information in the possession of the Government of the United Mexican States that refers to the allegations contained in

the documents in possession of same and that the Attorney General has taken into account the results of the review of said information.

As a result of such considerations the Attorney General has concluded that and declares in his capacity as the Attorney General of the Republic that all acts and

IN THE 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

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASOCIACION DE RECLAMANTES,
et al.,
Plaintiffs,
v.
THE UNITED MEXICAN STATES,
Defendant.
Civil Action No. 2299

INTRODUCTION

The Defendant United Mexican States ("Mexico") has filed a broad and general motion asking this Court to dismiss Plaintiffs' class action suit for declaratory relief and damages. Despite Plaintiffs' well-pleaded allegations demonstrating that their claims relate to property in the United States an that Mexico undertook extensive actions in this country between 1923 and the present, Mexico argues that subject matter and personal jurisdiction are lacking. And, notwithstanding Plaintiffs' further allegations that Mexico has repeatedly affirmed, even as recently as January, 1980, its obligation to honor its debt to Plaintiffs, Mexico has also urged dismissal on act of state and statute of limitations grounds.

Plaintiffs submit that any reading of their Amended Complaint demonstrates that this Court has both subject matter and personal jurisdiction under the Foreign Sovereing Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.* (hereinafter "FSIA"). Mexico's act of state and limitations defenses are likewise without merit and, in any event, turn on factual issues that cannot be resolved on a motion to dismiss. Accordingly, the motion to dismiss should be denied.

STATEMENT OF FACTS

Plaintiff's claims against Mexico stem from its taking in 1941 of their claims, against the United States, for the return of twelve million acres of land in South Texas or for payment of its value. The Treaty of November 19, 1941,

between Mexico and the United States[1] (hereinafter the "1941 Treaty") culminated proccedings against the United States by Mexico, on the Plaintiffs' behalf, that had been initiated under the General Claims Treaty of September 8, 1923[2] (hereinafter the "1923 Treaty"). Mexico filed 433 claims for Plaintiffs against the United States with a claims commission established under the 1923 Treaty. By these claims Mexico sought the return to Plaintiffs of 12 million acres of land in Texas or payment of its value, $193 million. Plaintiffs' families had acquired these lands under grants made by the Spanish and Mexican governments during their respective periods of sovereignty over Texas.

Mexico ceded Texas to the United States by the Treaty of Guadalupe Hidalgo[3] at the and of the Mexican-American War in 1848. Under this treaty, Plaintiffs' families' rights to the 12 million acres were entitled to the protection and respect of the United States. However, Plaintiffs' families' lands were taken from them in violation of the treaty, and international and domestic law. Amended Complaint 11-12. It was these losses that provided the basis for the claims Mexico advanced against the United States on Plaintiffs' behalf. However, Plaintiffs' claims and many of those that the United States had asserted against Mexico were not resolved by the procedures established under the 1923 Treaty and ancillary protocol. Thus, in order to finally resolve the liability of each government on the claims that had been asserted against it, Mexico and the United States entered into the 1941 Treaty. Pursuant to the 1941 Treaty, Mexico released the United States from any liability on the 433 claims in had espoused on Plaintiffs' behalf, while the United States granted Mexico a reciprocal release from claims asserted against it. As a result, Mexico became obligated to satisfy Plaintiffs claims. Indeed, this was the ba-

[1] The 1941 Treaty grew out of the 1923 General Claims Treaty between the United States and Mexico, 43 Stat. 1730, T.S. No. 678, and the 1934 General Claims Protocol, 49 Stat. 3531, E.A.S. No. 57. Article V of the 1923 Treaty expressly stated that the treaty's purpose was to provide "just and adequate compensation for [the] losses and damages" suffered by the claimants represented by each sovereign, including Plaintiffs. Article IX of the Treaty provided that once the value of the claims was determined by the General Claims Commission established under its terms, the two governments would engage in a set-off, to the extent that the claims were equal in value, with payment of the difference to the government in favor of whose claimants the greater amount may have been awarded. Thereafter, each government was to pay the claims of those whom it had represented. The General Claims Commission was replaced by a different claims review mechanism in the 1934 Protocol, which expressly provided that, except for this change, the 1923 Treaty provisions "shall be considered as fully efective and binding" on both governments. 1934 Protocol, § 6(f). The 1941 Treaty, in turn, was enacted pursuant to § 5 of the 1934 Protocol, and was based upon and incorporated the payment obligations of the 1923 Treaty. Such agreements must all be consueld as a whole. *United States v. Belmont*, 301 U.S. 324 (1937); *In re Ross*, 140 U.S. 453 (1891).

[2] *See*, note 1, *supra*

[3] Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207. Under this Treaty, moreover, all Mexicans who remained in Texas after the war, including most of Plaintiffs' families, automatically became American citizens one year after the treaty's effective date unless they elected otherwise. *See* Art. VIII, Treaty of Guadalupe-Hidalgo.

sic understanding of the 1923 and 1941 treaties: Each government was to be responsible for satisfying the claims it originally espoused, the United States being obligated to compensate those claimants whom it had represented against Mexico, and Mexico being obligated to compensate Plaintiffs, whom it had represented against the United States.

Since the Mexican Presidential Decree of December 9, 1941,[4] issued shortly after the signing of the 1941 Treaty, Mexico has repeatedly acknowledged and reaffirmed its obligation to pay Plaintiffs' claims. In addition to letters written to members of the Plaintiff class in the 1950's, and 1970's affirming Mexico's intention to pay these claims, as recently as January 8, 1980, Mexico's Ambassador Sergio Gonzalez Galvez, head of the Legal Advisor's Office of the Mexican Foreign Ministry, assured Plaintiffs that Mexico would honor its obligation to compensate them for its taking and use of their Texas land claims. Amended Complaint, 47. He indicated that payment had been ordered by the "highest authority" in the Mexican government. *Id.* By September 1, 1981, however, Mexico had failed to make the promised payment. *Id* 56. Thus, Plaintiffs filed this class action lawsuit seeking declaratory relief and damages.

As demostrated below, these facts plainly establish jurisdiction under the FSIA, and defeat Mexico's other efforts to dismiss this case on the pleadings.

ARGUMENT

I. SUBJECT MATTER JURISDICTION EXISTS UNDER *THE FOREIGN SOVEREIGN IMMUNITIES ACT.*

The FSIA was designed to codify the defense of sovereign immunity and to provide greater access to United States courts for parties in disputes with foreign sovernmets where the disputes have a conection whit or arise in this country. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Ad. News 6604 (hereinafter "House Report"). As demostrated below, this Court has subject matter jurisdiction pursuant to § 1605(a)(4) and (a)(5) of the FSIA.[5].

[4] *See* Decree of President Manuel Avila Camacho, December 9, 1941, published in Diario Oficial, December 31, 1941, Vol. CXXIX, § 5, pp. 1-2 (hereinafter "1941 Decree"). *See* Amended Complaint § 27 and Exhibit D thereto.

[5] Mexico argues that the FSIA in the exclusive source of subject matter jurisdiction. Defendant's Memorandum at 4-5, *citing Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-76 (2d Cir. 1981); *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). Since *Ruggiero* and its progeny dealt only with the right to a jury trial, treir precise holdings are inapposite here as plaintiffs do not seek a jury trial. Plaintiffs submit that while it is necesary, in order to overcome Mexico's sovereign immunity defense, to meet the FSIA's criteria, once sovereign immunity is rejected jurisdiction exists under any otherwise applicable statute, including § 1331 (federal question). *Cf. Tuck v. Pan American Health Organization*, 668 F.2d 547, 549 (D.C. Cir. 1981); *see Trans-Bay*

A. This Case Concerns Rights In Immovable Property Situated in Texas. *Therefore Subject Matter Jurisdiction Exists Under § 1605(a)(4).*

Plaintiffs' claims against Mexico are rooted in American soil. They clearly involve "rights in immovable property situated in the United States" and thus, meet the requirements of § 1605(a)(4) which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States. . . *in any case in which* rights in property in the United States acquired by succession or gift or *rights in immovable property situated in the United States are in issue.*

Subsequent to 1848, Plaintiffs' families were driven from over twelve million acres of land in south Texas despite the guarantees of the Treaty of Guadalupe Hidaldo and international law. *See* D. Weber, *Foreigners In Their Native Land* 155 (1973). These dispossessions gave rise to widespread disputes concerning Plaintiffs' claims to this "immovable property situated in the United States."

In each of the 433 claims Mexico filed against the United States on Plaintiffs' behalf, it sought the return of their land in Texas or compensation therefor, stating:

> When [Texas,] the territory in which said lands were located [,] passed to the sovereignty of the United States of America, the rights of said grantee and his heirs. . . were duly respected, except from trespass, until the year 1870, when the State of Texas as a State of the United States of America, then and thereafter. . . depriv[ed] said heir of rights to said land or the right to enter thereon, all in violation of the laws of the United States of America, international law and guarantees provided by the TREATY OF GUADALUPE HIDALGO, between Mexico and the United States, of 1848; and that the claimant having thus been deprived of property, as herein described, without due process of law, and without just compensation, *hereby make this claim against the United States of America for the restoration to claimant, the legitimate owner, of said lands,* or for payment of its value. . . . (Emphasis added)

See Amended Complaint 19. It was these claims "for restoration...of...lands or for payment of its value, "then worth at least

Engineers and Builders, Inc. v. Hills, 551 F.2d 370, 376 (D.C. Cir. 1976). This action undisputably raises "federal questions" under international law and treaties between the United States and Mexico. *Seep* pp. 21-22, *infra.* However, because defendant's jurisdictional argument is premised on its immunity, and because Plintiffs agree that the issue must be decided under the FSIA (20 U.S.C. §§ 1330, 1605), it is at this point of no consquence wherher § 1331 jurisdiction exists as well. *See also* note, 15 *infra.*

$193 million, that were released by Mexico under the 1941 Treaty in exchange for a release from its obligations towards American claimants.[6] Dawson and Weston, *Prompt, Adequate and Effective; A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727, 741 (1962) (authors calculate that, under the 1941 Treaty, Mexico was released from more than $350 million in American claims).

Notwithstanding its own prior characterization of Plaintiffs' claims, as being "for the restoration of lands," Mexico now seeks to avoid the jurisdictional grant of § 1605(a)(4) by sugesting that Plaintiffs' claims are not "title" claims. Defendant's Memorandum at 10. While neither the FSIA nor its legislative history especifically defines "rights in immovable property," immovable property is a concept with a well-established meaning derived from the civil law. 1 G. Thompson, *Commentaries on the Modern Law of Real Property* § 14 at 57-58 (1980) replacement). *See* House Report at 9 (indicating relevance of civil law). Under the civil law it is plain that the term "rights in immovable property" includes funds owed as a result of the disposition of a claim to real property.

The Louisiana Civil Code is a rich source for the definition of "rights in immovable property" since it, like other civil codes, expressly utilizes the term "immovables" in categorizing property interests. *See* La. Civ. Code Ann. arts. 462-470 (West 1980) (immovables); *see also* Mexican Civ. code art. 750 (Ediciones Andrade 1976) (immovables); *United States v. McLain*, 545 F.2d 988, 1003 (5th Cir. 1977) (examination and application of Mexican law concerning immovables). Louisiana law makes it abundantly clear that Mexico's suggestion that the clause "rights in immovable property" relates only to title or ownership matters in wrong. "Rights in immovable property" include a broad range of usufructuary or beneficial interests derived from land, *e.g.*, leases, licenses, rents, mineral rights, easements, royalties and profits. *See, e.g.*, La. Civ. Code Ann. art. 535 (west 1980)..*compare* Mexican Civ. Code art. 980 (Ediciones Andrade 1976) (usufruct). Article 535 of the Louisiana Civil Code defines usufruct as a "real right." The legislative comment immediately following this article explains that "Usufruct is a. . . *right in immovable property.*" (Emphasis added). In *Charke v. Brecheen*, 387 So.2d 1297, 1301 (La. App. 1980) the Court Stated: "[A] person who has a usufruct over immovable property has two basic rights - the right to possess, use and enjoy the porperty *and the right to receive the fruits produced by the property.*" (Emphasis added). Obviously "rights in immovable property" are not limited to titles. *Cf.* La Civ. Code Ann. arts. 550-569 (West 1977) (rights of the usufructuary); Mexican Civ. Code arts. 989-1005 (Ediciones Andrade 1976) (same).

[6] In addition to the reciprocal release, Mexico received through ancillary agreements a $30 million loan from the United States Export-Import Bank; an agreement by the United States to buy millions of ounces of Mexican silver; plus a $40 million loan for a peso stabilization fund. Briggs, *The Settlement of Mexican Claims Act of 1942*, 37 Am. J. Int'l L. 222, 232 (1943) *citing*, *e.g.*, "Agreements With Mexico," Dep't St. Bull., Vol. V, No. 126 (Nov. 22, 1941) pp. 399-403.

It has long been recognized in both the civil and common law that, in situations like the present where land claims have been taken, the compensation fund retains the character of real property. As a leading commentator summarized:

> A fund derived from a payment by the city for lands taken for school purposes for the benefit of unknown owners must be treated as real estate. Also, insurance money realized from the destruction of buildings on devised real estate will be treated as real property. Upon a conveyance of land by the executor of a testator in pursuance of and option given by the testator during his lifetime, the proceeds of the sale pass as real estate. The proceeds of the sale of real estate, made by decree of court in a partion suit, retain the character of real estate for the purposes of distribution. *Likewise, where there is a compulsory conversion of real estate, as in the exercice of the power of eminent domaint, and without the consent or against the will of the owner of the fee, the compensation awarded will be treated as real estate until the owner, being sui juris, accepts it as personal property.*

1 G. Thompson, *Commentaries on the Modern Law of Real Property* § 19 at 83 (1980 Replacement) (emphasis added and citations omitted); *cf.* La. Civ. Code Ann. art. 615 (West 1977) (change of form of property); *Bank of Delaware v. Hargraves*, 242 A.2d 472 (Del. Ch. 1968) (proceeds stemming from sale of property by fiduciary are treated as real property).

In short, rights in real property or immovables refer to the use of and benefits derived from land and not merely issues of ownership. *See* House Report *supra* pp. 3-4, at 20. Therefore, Mexico's attempt to circumscribe the meaning of "rights in immovable property" must be rejected.

The breadth of the phrase "rights in immovable property" is aptly illustrated by a recent § 1605(a)(4) case in Virginia. In *County Board v. German Democratic Republic*, No. 78-293-A (E.D. Va. Sept. 6, 1978), *reprinted in* 17 *Int'l Legal Mat'ls* 1404-06 (1978), the county sought to collect real property taxes on an apartment building owned by the German Democratic Republic. The court speciafically forund jurisdiction under the "immovable property" clause of § 1605(a)(4) as well as § 1605(a)(2) (commercial activity). *See* Carl, *Suing Foreign Governments In American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 S.W.L.J. 1009, 1020 (1979). Clearly, the county was not asserting a competing title claim but merely seeking monies owed which were derivative of real property. The Fourth Circuit, in related proceedings, recognized and did not disturb the district court's § 1605(a)(4) conclusion. *United States v. County of Arlington*, Nos. 81-1094, 81-1125 (4th Cir. Feb. 1, 1982). Here, Plaintiffs are not asserting title claims but rather are seeking to collect monies owed because of Mexico's taking and use of their immovable property rights in Texas. Plaintiffs' case is even stron-

ger than *German Democratic Republic* since there the taxes due merely related to the land while here the fund due replaced the land.

The fact that Mexico assumed the obligation to satisfy Plaintiffs' taking claims under the 1941 Treaty does not in any way change their nature. Consistent with prior American practice, the obligation to satisfy Plaintiffs' land claims against the United States became that of Mexico. *See Great Western Ins. Co. v. United States,* 112 U.S. 193 (1884); *Ex Parte Atocha*, 84 U.S. 439 (1873). But the assumption of the obligation to satisfy Plaintiffs' land claims did not change the nature of those claims, which concerned "rights in immovable property situated in the United States." *See Bachman v. lawson*, 109 U.S. 659 (1884); *Comegys v. Vasse,* 26 U.S. (1 Pet.) 193 (1829). The teaching of these cases is that the character of a claimant's right under a claims settlement treaty is determined by reference to the underlying controversy.[7]

Here, it is quite evident that the pertinent Mexican governmental acts, *i.e*, the 1941 Decree and the 1941 treaty, relate to an underlying controversy concerning immovable property in Texas. The fact that the 1941 Treaty changed Plaintiffs' remedy from either the return of the land of the payment of just compensation therefor by the United States to the payment of monetary compensation by Mexico does not alter the nature of this controversy: this is, fundamentally, a case concerning "rights in immovable property situated in the United States" and, therefore, within the purview of § 1605(a)(4).

B. This Case Concerns Plaintiffs' Rights In Property In The United States Acquired By Succession, And Therefore, Subject Matter *Jurisdiction Also Exists Under The "Succession" Clause of § 1605(a)(4).*

Section 1605(a)(4) is not limited to "rights in immovable property situated in the United States," but extends to any case "in which rights in property in the United States acquired by succession or gift" are in issue. Thus, even if this

[7] In *Bachman v. Lawson,* for example, plaintiffs sued for compensation under a retainer agreement by which they were to assist the defendant in securing redress from Great Britain for an injury suffered as a result of the seizure of a vessel. After the agreement was signed, the 1871 Treaty of Washington provided for evaluation and payment of such claims; defendant retained diferent counsel to assist it before the claims tribunal; and refused to pay plaintiffs on the grounds that their agreement "relat[ed] solely to the claim which existed at its date; [and] that claim was extinguished by the operation of the treaty of Washington." 109 U.S. at 662. The Supreme Court rejected this argument decisively:

> "The right to indemnity for an unjust capture . . . is a right attached to the ownership of the property itself. . . . The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice. . . . It recognized an existing right to compensation. . . ." *Comegys v. Vasse,* 1 Pet. 193, 215-17.
> The claim established before the Court of Commissioners of Alabama claims was manifestly the very claim contemplated by the agreement in suit."

109 U.S. at 662.

case were viewed only as an action to enforce a debt or other intangible right, it would fit the succession clause of § 1605(a)(4) since the debt, whether real or personal, is property Plaintiffs "acquired by succession" and located "in the United States."[8]

The situs of Mexico's debt to Plaintiffs is the United States since, as shown above, the debt retains the character of the real property located in Texas. Moreover, even if the debt were not treated as real property it would nonetheless be located in the United States since intangible property, such as a debt, is found at the domicile of the owner. *Texas v. New Jersey*, 379 U.S. 674 (1965); *Blodgett v. Silberman*, 277 U.S. 1, 9-10 (1928). As the Court held in *Texas v. New Jersey*," . . .*since a debt is property of the creditor, not of the debtor*, fairness among the States requires [that escheat rights be accorded to creditor's state]." 379 U.S. at 680 (emphasis added). Here, the wast majority of Plaintiffs are citizens and residents of the United States and their property, the "debt," is also located in the United States.

Mexico implicitly recognizes that, by its plain terms, § 1605(a)(4) confers jurisdiction in this case, for it bases its argument on the proposition that the legislative history suggests that the succession clause of § 1605(a)(4) applies only to property acquired by a foreign government. Defendant's Memorandum at 10. But the legislative history plainly indicates that the term "property" includes the property rights of Americans. *See* House Repor, *supra*, pp. 3-4, at 7. Indeed, the legislative history indicates that Congress was chiefly concerned with providing "our citizens" whit access to court, and one of the examples cited concerns the contracts rights of "an American property owner." *Id.* This Congressional design refutes any argument that the term "property" is limited to the property of the foreign state.

This Court has considered and rejected an analogous legislative history argument. In *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1981), the defendant pointed to legislative history to bolster its argument that Congress was only concerned with traffic accidents and did not intend § 1605(a)(5) to cover "political" torts. However, this Court refused to restrict the meaning of § 1605(a)(5) to traffic accidents, stating:

> The relative frequency of automobile accidents and their potentially grave financial impact may have placed that problem foremost in the minds of Congress, but the applicability of the Act was not so limited, for the committees made it quite clear that the Act "is cast *in general terms* as appling to *all tort actions* for money damages.". . .

[8] It is well-settled that plaintiffs may proceed on alternative or even inconsistent theories at this stage of the proceedings. *See, e.g., Michael v. Clark Equipment Co.*, 380 F.2d 351, 352 (2d Cir. 1967).

488 F. Supp. at 672.[9] Section 1605(a)(4) is likewise cast in general terms applying to all actions involving rights in certain property in the United States.

Here, while § 1605(a)(4) may have been prompted by the desire to provide a forum to litigate against foreign states with respect to their alleged property interest, the legislative history in no way indicated that only questions relating to the property issues reised by foreign states may be litigated. The inclusion of American property rights in the jurisdictional grant of § 1605(a)(4) is required by the express language of the statute. *See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). Moreover, this construction is neither absurd nor mischievous, but rather is within the spirit of the FSIA which is to liberalize access to American courts by parties asserting rights arising out of property located in this country, and, conversely to restrict the immunity of foreign sovereigns. On the other hand, Mexico's profeered interpretation of § 1605(a)(4) would be contrary to the language and intent of the FSIA since it would expand sovereign immunity and restrict access to American courts.[10] Plaintiffs' claims fit the terms of § 1605(a)(4), *i.e.*, they concern property rights acquired by succession and located in the United States. Therefore, this Court has subject matter jurisdiction under the succession clause of § 1605(a)(4).

[9] This Court's reasoning in *Letelier* has roots in American jurisprudence as far back as *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). There it was argued that the term "contact" did not include a charter from the English crown to establish a college since the corporate charter issue was not the motivating concern which prompted the Constitutional Convention to draft the impairment of contract clause. Chief Justice Marshall rejected this argument, stating:

> It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was drafted. . . . But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, . . . unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention when the article was framed. . . . The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify . . . an exception.

17 U.S. at 644-45.

[10] Defendant's interpretation of the FSIA would also reise constitutional problems since it would deny plaintiffs their constitutional right to access to United States courts in violation of the guarantee of equal protection, *see Truax v. Corrigan*, 257 U.S. 312 (1921) (selective denial of equity jurisdiction); *cf.* Sager, *Foreword: Constitutional Limitations on: Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 68-74 (1981) (discussion of selective denial of jurisdiction). Defendant's approach runs afoul of the rule that statutes should be interpreted to avoid constitutional questions. *United States v. Rumley*, 345 U.S. 41, 45 (1953).

C. Subject Matter Jurisdiction Exist Under § 1605(a)(5) For Damage *To or Loss Of Property Caused By Mexico's Tortious Conduct.*

Section 1605(a)(5) of the FSIA also confers subject matter jurisdiction upon this Court to adjudicate the instant controversy. It allows courts to hear claims.

> in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office of employment.

Plaintiffs' Amended Complaint sets forth claims that fall within this section and are not barred by either of the two express exemptions to such jurisdiction for "discretionary" acts or certain international torts.

1. *Mexico Has Engaged In Tortious Acts Or Omissions.*

As this Court noted in *Letelier v. Republic of Chile*, 488 F. Supp. at 672, § 1605(a)(5) is cast in general terms applying "to all tort actions for money damages." It is designed to make justiciable not only claims of victims of traffic accidents but also damage claims of victims of other noncommercial torts. House Report, *supra* pp. 3-4, at 20-21. Plaintiffs submit that Mexico's taking and use of their Texas land claims without compensation constitutes a "tortious act or omission" within the scope of § 1605(a)(5). Such uncompensated takings constitute violations of international and domestic law, and are tortious under common law doctrines of conversion or other similar torts.

Under international law[11] it is clear that the taking of private property without payment of prompt, adequate and effective compensation is wrongful. *Banco Nacional de Cuba v. Chase Manhattan Band*, 658F.2d 875, 887-93 (2d Cir. 1981) (and authorities cited therein); *American International Group v. Islamic Republic of Iran*, 493 F. Supp. 522, 524 (D.D.C. 1980), *aff'd in re-*

[11] International law is a part of federal common law. *The Paquete Habana*, 175 U.S. 677 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Defendant relies on *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) for the proposition that international law controls only a foreign state's relations to "aliens." But the Second Circuit recently disavowed this aspect of *Dreyfus* as being "clearly out of tune with the current usage and practice of international law." *Falartiga v. Pena-Irala*, 630 F.2d at 884.

Moreover, the vast majority of the Plaintiff class has been, since the 19th centuty, American citizens and residents and thus "aliens" for purposes of Mexico's violation of their rights to compensation for the taking of property, *see* Restatement (2d) Foreign Relations Law of the United States, *supra*, § 171 ("alien" is, *inter alia*, national of different state); *cf. Treaty of Guadalupe-Hidalgo*, § VIII (all Mexican citizens resident in Texas become U.S. citizens within 1 year after effective date of this treaty). Mexico's argument that this case is one between Mexico and Mexican citizens is wholly without merit.

levant part, 657 F.2d 430 (D.C.Cir. 1981); Restatement (2d) Foreign Relations Law of the United States § 188 (1965). Indeed, under international law principles, separate and distinct violations of rights may arise from taking without any provision for the payment of compensation, Restatement (2d) of Foreign Ralations law of the United States, *supra,* § 185, and from a failure within a reasonable time after the taking to provide prompt, adequate and effective compensation. *Id* § 186. Thus, as the Second Circuit specifically held in *Banco Nacional de Cuba v. Chase Manhattan Bank,* "Whether or not an expropriation [itself] violates international law . . . the prevalent view is . . . that the failure to pay any compensation to the victim of an expropriation constitutes a violation of international law." 658 F.2d at 891.

American and Mexican law likewise hold that a sovereign's taking of property without providing adequate compensation is a wrongful act. In addition to Mexico's specific recognition by the 1941 Decree and otherwise of its obligation to compensate the Plaintiffs for its use of their property, Mexico's Constitution providens that "Expropriations may only be made for causes of public utility and with indemnification." Mex. Const. art. 27, *see also* Mexican Civil Code arts. 831, 836 (Ediciones Andrade 1976); Baggett, *Article 27 of the Mexican Constitution: The Agrarian Question,* 5 Tex. L.Rev. 1, 6 (1926). American law also prohibits the government from taking private property without paying just compensation. U.S. Const, amend. v; *see, e.g., Armstrong v. United States,* 364 U.S. 40 (1960) (attachment entitling creditor to resort to specific property for satisfaction of a claim is a property right compensable under the Fifth Amendment).

Indeed, the American courts have recognized that a government's release of private claims against a foreign sovereign for a valuable consideration may give rise to a "takings" claims against the releasing sovereign for compensation. Thus, in *Gray v. United States,* 21 Ct. Cl. 340 (1886), the Court of Claims concluded that the United States' use of claims of American ship owners against France in a treaty with that country to "se off . . . claims against the Unites States," gave rise to a claim of right against the Unites States by the "citizen whose property is thus sacrificed for the sefety and welfare of his country," 21 Ct. Cl. at 392-93, notwithstanding the absence of a cash payment to the United States in liquidation of the claims of the ship owners. *See also* 2 Wharton, *Digest of International Law* § 220, at 566 (2d ed. 1887). And, just last Term, the Supreme Court specifically acknowledged "the possibility that the President's actions [in suspending claims of American citizens against Iran by international agreement] may effect a takingt of . . . property" for which suit would lie in the Court of Claims under the Tucker Act. *Dames & Moore v. Regan,* 101 S.Ct. 2972, 2991 (1981). In his opinion concurring and dissenting in part, Justice Powell asserted that, "The Government *must* pay just compensation when it furthers the nation's foreign policy goals by using as 'bargaining chips' claim lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.* at 2992-2993 (emphasis added).

Acts of "taking" by public bodies have long been recognized as analogous to a tortious "conversion" of property by a private person. *See, e.g.*, Restatement (2d) of Torts (1979), §§ 895A, 895B (discussion of governmental liability for taking of property).

See also, Land v. Dollar, 330 U.S. 731, 736 (1947); *cf. United States v. Causby*, 328 U.S. 256 (1946) (trespass through military flights deemed a "taking").[12] The essential elements of a conversion are "any unlawful exercise of ownership, dominion or control over the personal property of another, in denial or repudiation of his rights thereto." *Shea v. Fridley*, 123 A.2d 358, 361 (D.C. 1956). *See* Restatement (2d) of Torts, *supra*, § 222A; *Smith v. Whitehead*, 436 A.2d 339 (D.C. 1981); *Blanken v. Harris, Upham & Co.*, 359 A2d 281 (D.C. 1976). A conversion may occur through a "wrongful taking . . . or by a wrongful detention . . . or by a wrongful disposal." *Pierpont v. Hoyt*, 260 N.Y. 26, 29, 182 N.E. 235, 236 (1932). The distinguishing feature of the common law action for conversion is the measure of damages: a conversion entitles plaintiff to recover the full value of the property and the defendant is, in effect, put to a forced judicial sale. Prosser, *Law of Torts*, 80-82 (4th ed. 1971); *Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). A conversion, then, occurs when there has been a misappropriation of another's property of such a degree that the courts will deem there to have been a *taking* of that property which renders it fair to require the defendant to answer in damages for the full value of the thing taken. Prosser, *supra*, at 80-81.

While at common law the remedy of conversion was generally limited to tangible chattels, it is now universally accepted that an action for conversion of intangible rights —such as a chose in action— will lie. *See, e.g., Kuhn v. McAllister*, 1 Utah 273 (1875), *aff'd* 96 U.S. 87 (1877) (conversion of stock); *see generally*, Comment, *Conversion of Choses in Action*, 10 Fordham L. Rev. 415 (1941); Prosser, *supra*, at 81-83. The Restatement (2d) of Torts, § 242, states the general rule regarding conversion of documents and intangible rights to be as follows:

> (1) where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
> (2) one who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

[12] Because of the jurisdictional prerequisites of 28 U.S.C. § 1346 (does not extend to claims That "sound in tort") and the United States' refusal to waive immunity for torts until 1946, claims against the United States for takings of property have generally been pled either as direct violations of the Fifth Amendment or as acts giving rise to an implied contractual obligation to pay. *See. e.g., Portsmouth Co. v. United States*, 260 U.S. 327, 330 (1920). This pleading, analogous to common law "waiver of the tort to sue in assumpsit," *Great Falls Mfg Co. v. Garland*, 124 U.S. 581, 598 (1888), in no way changes the underlying nature of the tortious conversion.

Thus, tort claims for conversion of notes, judgments, insurance polices, stock, bonds and other evidences of interes of ownership have been widely accepted. *See, e.g., Langley Federal Credit Union v. Harp,* 471 F. Supp. 565 (D.D.C. 1979) (conversion of funds intended for certificate of deposit to loan); *Horne v. Frances I. DuPont & Co.*, 428 F. Supp. 1247 (D.D.C. 1977) (conversion of bonds).

The same reasoning applies to the tortious conversion of a claim such as a cause of action, regardless of whether it is of the type normally embolied in such a document. Thus, in *Story v. Gammell,* 68 Neb. 709, 94 N.W. 982 (1903), the Nebraska Supreme Court held that:

> [I]f the defendants have fraudulently of tortiously deprived Plaintiff of a valid cause of action, they are liable to respond for its value in an action for damages at law. In such case they are guilty of the wrongful conversion of a chose in action.

94 N.W. at 983. While the leading authorities are in agreement that there is no reason why the tort of conversion should not continue to develop to include intangible rights not of the kind generally embodied in a document, *see* Prosser, *supra*, at 82; Restatement (2d) of Torts, *supra*, at § 242 (comment f); Comment, *Conversion of Choses in Action, supra,* at 424-25, in this case the Court need not go so far.

The claims asserted in this suit are of the type customarily embodied in a document – here, the original grants of land. While Mexico may not have in every case literally converted such documents, it has, by its release of claims, rendered it impossible for Plaintiffs to exercise or use the rights represented by those documents or to seek relief from the United States for the taking of their property. *Cf. e.g., Plunkett-Jarrell Grocery Co. v. Terry,* 222 Ark. 784, 263 S.W.2d. 229 (1953) (defendant who took plaintiff's account book, thereby preventing plaintiff from proving its claims against certain debtors, was liable for conversion of account owed); *Rivinus v. Langford,* 75 F. 959 (2d Cir. 1896) (defendant converted judgment by giving release without authority and without getting full value for other creditor); *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 103 N.W. 685 (1905) (refusal to enter stock transfer on corporate books, thereby preventing exercise of rights of ownership of stock). *See also Pierporint v. Hoyt,* 260 N.Y. 26, 182 N.E. 235 (1932) (conversion of an unendorsed certificate of stock also constitutes conversion of the share of stock); *Briton v. Ferrin,* 171 N.Y. 235, 63 N.E. 954 (1902) (commission agent who failed upon reasonable demand to surrender proceeds of sale was guilty of conversion).

The fact that the taking here was done by Mexico, a sovereign state, no more relieves it of the liability and obligation to compensate Plaintiffs for the taking of their property in this country – an obligation it has repeatedly recognized – than does its status as a sovereign immunize it from liablity for a traffic accident in this country. A taking by a sovereign is not wrongful when

accompanied by just compensation, but a sovereign's taking of claims without payment of such compensation is, like the taking of claims by a private person, a "tortious act or omission." That a taking of property by a public authority may give rise to tort liability for conversion has been recognized in the District of Columbia and the federal courts for many years. *See, e.g., Tucker v. Nebeker,* 2 App. D.C. 326 (1894) (District of Columbia liable for tort of conversion when it took charge of certain monies and expended them for benefit of District rather than holding them for lawful owner); *Aleutco Corp. v. United States,* 244 F.2d 674 (3d Cir. 1957) (affirmed judgment against United States for conversion of defendant's property in tort action under Federal Tort Claims Act, rejecting United States' argument that exclusive jurisdiction was in Court of Claims under Tucker Act).

Thus, Plaintiffs submit that their Amended Complaint more than adequately alleges that Mexico's acts and omission were "tortious" within the meaning of § 1605(a)(5).[13]

2. Mexico's Conduct Caused Damage To Or *Loss Of Property In The United States*

The second criterion of § 1605(a)(5) —that the damage to property must have occurred in the United States— is readily satisfied here.[14] Plaintiffs' class consists primarily of United States citizens and residents.[15] Their real pro-

[13] By soliciting claims and then seeking to act on behalf of the claimants, Mexico assumed a role analogous to that of a trustee or an attorney. Thus, in addition to the common law tort of conversion evinced by mexico's conduct, Mexico breached fiduciary duties owed to plaintiffs and to that extent as well engaged in tortious conduct causing injury to plaintiffs' property. Restatement (2d) of Torts, *supra,* § 874.

[14] The plain language of § 1605(a)(5) belies defendant's claim that the tortious act itsel must occur in the United States. *Perez v. The Bahamas,* 652 F.2d 186 (D.C. Cir.), *cert. denied,* 102 S. Ct. 326 (1981) (gunshot wound at sea), is anapposite, since all constituent elements of the tortious acts and injuries there occurred abroad. Accord, *Harris v. VAO Intourist, Moscow,* 481 F. Supp. 1056 (E.D.N.Y. 1979) (death in Moscow hotel fire), *Upton v. Empire of Iran,* 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.,* 607 F.2d 494 (D.C. Cir. 1979) (Teheran Airport terminal collapse causing personal injury). Here, in contrast, most in not all of the constituent elements of the conversion took place in this country. Mexico's agents came into this country and, over a prolonged period of time, actively solicited and prepared Plaintiffs' land claims. Treaties were negotiated and signed here and Mexico obtained commercial benefits here. Amended Complaint §§ 18, 19, 21, 22, 26, 27, 29. Moreover, the economic impact of the conversion —Mexico's failure to pay any compensation— occurred solely in this country, and the absence of compensation comprises a constituent elemento of Mexico's wrongful conduct. *See also* restatement 2d of the Foreign Relations Law of the United States § 18 (1965).

[15] Mexico's assumption that all plaintiffs are Mexican nationals simply cannot be accepted in view of the allegations in the Amended Complaint that at the present time four of the six named individual plaintiffs are American residents and citizens and that at the time Mexico asserted, negotiated and settled these claims, many of the claimants of whose behalf it acted were American citizens. Thus, Mexico's argument that Article III of the United States Constitution precludes this Court from exercising subject matter jurisdiction rests on a faulty premise, since Article III specifically allows suits between "a State, or the Citizens thereof, and foreign states." With regard to

perty was located entirely in the United States. The cause of action arising from the taking of that property, and Mexico's obligation to pay them — being intangible rights — are generally deemed to be located where the creditor resides. *See Texas v. New Jersey*, 379 U.S. 674 (1965). *See* pp. 25-26, *infra*. Thus, whether the property in question is regarded as the land in Texas, or as Plaintiffs' claims or causes of action arising out of that land - the damage or loss occurred in the United States. The circumstance that a small percentage of the Plaintiff class are citizens and residents of Mexico does not detract from the fact that the overwhelming weight of the damage complained of occurred to Plaintiffs located in the United States and thus, under any view, occurred in the United States for purposes of § 1605(a)(5).

3. *Mexico's Failure To Pay Compensation Is Not A "Discretionary" Act*

Finally, Plaintiffs submit that the Mexican acts complained of do not fall within the "discretionary act" exemption of § 1605(a)(5)(A).[16] Mexico's contrary argument is based on a fallacious premise. Defendant's Memorandum at 13. The gravament of Plaintiffs' Amended Complaint is not that Mexican officials have, in an exercise of discretion, failed to take steps to have funds appropriated for the payment of compensation to Plaintiffs. Rather, Plaintiffs assert that Mexico has failed to compensate Plaintiffs for it wrongful taking of their property. Once that taking occurred the law imposed an obligation to provide just compensation. That obligtion and its satisfaction are not matters of discretion. *Compare Aleutco Corp. v. United States, supra*, 244 F.2d 674 (upholding claim against United States for conversion under Federal Tort Claims Act) *with Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 910

those claimants sho are Mexican citizens, moreover, Plaintiffs submit that this Court has jurisdiction to adjudicate their claims. It is beyond dispute that, if a federal question is present in a controversy, a court may, under article III, exercice jurisdiction even if both parties are liens. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); *ITT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975). The present controversy is replete with federal questions, *e.g.*, Plaintiffs' rights under the 1923 and 1941 Treaties and international law, and thus this Court may constitutionally exercise jurisdiction over Plaintiffs' claims. Mexico's reliance on *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 997 (1982) is mistaken since that case did not involve federal questions. Moreover, the decision in *Verlinden* is inconsistent with Congress' established power to make grants of "protective jurisdiction" where important federal concerns, such as the foreign relations of the United States, are at stak. *See, e.g., Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824); *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885); *National Mutual Insur. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949). In any event, the Supreme Court will no doubt settle this point in its decision in *Verlinden* well before it would be of significant relevance here.

[16] The provisions of § 1605(a)(5)(B) precluding claims arising out of "malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contact rights" are plainly not applicable here.

(1961) (denying a claim against United States for negligent manner of condemnation, because the acts involved were discretionary).

Indeed, to deny a recovery for tortious conduct on the grounds that the foreign state has discretion to determine whether compensation should be paid, would turn the FSIA on its head. As this Court noted in the *Letelier* case, the discretionary act exemption of § 1605(a)(5)(A) is similar to the exemption applicable to the United States in the Federal Tort Claims Act. Cases under that Act hold that a discretionary act is one in which "there is room for policy judgment and decision" at the policy planning level. *Delehite v. United States,* 346 U.S. 15, 36 (1953); *Sami v. United States,* 617 F.2d 755, 765 (D.C. Cir. 1979). Here, Mexico engaged in a discretionary exercise of judgment and policy in determining whether to release Plaintiffs' claims in its negotiations whit the United States. Having made that judgment, however, Mexico incurred a legal obligation, in no way "discretionary," to provide appropriate compensation to the claimants, *See, e.g., Eastern Air Lines Inc. v. Union Trust Co.,* 221 F.2d 62, 77 (D.C. Cir.) *Aff'd sub nom. United States v. Union Trust Co.,* 350 U.S. 907 (1955) ("discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."). *Cf. Indian Towing Co. v. United States,* 350 U.S. 61, 69 (1955) (coast guard had discretion to install lingthouse, but no discretion to operate it negligently.)

Thus, the criteria for establishing jurisdiction under Section 1605(a)(5) have been met here. In view of the ample bases for the exercise of jurisdiction under the FSIA,[20] the defendant's challenge to this Court's jurisdiction must be rejected.[21]

[20] Mexico's suggestion that this case, filed in 1981, involves some prohibited "retroactive" application of the FSIA, enacted in 1976, is entirely without merit. The FSIA by its terms is of a procedural and jurisdictional character only. Thus, the FSIA falls within the well-established rule that procedural and jurisdictional statutes should be applied to cases pending at the time of their enactment. *See, e.g., Eikenberry v. Callahan,* 653 F.2d 632 (D.C. Cir. 1981); *Koger v. Ball,* 497 F.2d 702, 706 (4th Cir. 1974); *Sempeyreac v. United States,* 32 U.S. (7 Pet) 222, 239 (1833); *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974); *Hallowell v. Commons,* 239 U.S. 506, 508 (1916). *A fortiori* it should be applied to cases filed long after the enactment of the statute. *See also Montana Power Co. v. Federal Power Commission,* 445 F.2d 739, 247-48 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 1013 (1971) (change of tribunal is change of remedy and generally is applicable to outstanding contracts or licenses).

Indeed, the only decision to have specifically addressed whether the FSIA's sovereign immunity provisions should be applied retroactively to a case filed before its enactment concluded easily that it should. *Yessenin-Volpin v. Novosti Press Agency,* 443 F.Supp. 489, 851 n.l. (S.D.N.Y. 1978), The court there noted that the U.S. State Department had taken the position that the FSIA's immunity provisions should be applied in that pending case, and this was consistent with Congress' specific direction that "claims of foreign states to immunity" should "henceforth" be decided in conformity with that act. 28 U.S.C. § 1602. *Cf. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne,* 605 F.2d 648 (2d Cir. 1979) (distinguishing *Yessinin-Volpin* in holding that district court was not required to re-open judgment under Rule 60(b) to apply to FSIA standards). The instant action was filed years after the FSIA's enactment; subject matter jurisdiction under 28 U.S.C. § 1330 has been properly alleged; and, in accordance with the directive of 28

II. THIS COURT HAS PERSONAL JURISDICTION OVER MEXICO UNDER *APLICABLE CONSTITUTIONAL AND STATUTORY STANDARDS*

Mexico's argument that personal jurisdiction is lacking is without merit. Since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Due Process Clause has been recognized to "require only that in order to subject a defendant to a judgment *inpersonam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." 326 U.S. at 316, quoting, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). *Accord Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). It this case, Mexico's contacts with the United States as a forum are so substantial —both in connection with these very claims and in terms of its general, continuous business presence— that Mexico's argument to the contrary should be given short shrift.

To begin with, as the legislative history of the FSIA correctly points out, the subject matter jurisdictional provisions of § 1605(a) are so drefted that, whenever subject matter jurisdiction exist, constitutional minimun due process contacts will necesarily exist as well:

> Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states. . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. [citations omitted]. For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, section 1605-1607, requires some connection between the lawsuit and the United States or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

U.S.C. § 1602, Mexico's claims of immunity must be adjudicated in accordance with the standards set forth in the FSIA.

[21] It bears noting that while, under the FSIA, Jurisdictional issues require close attention to the nature of a plaintiff's underlying causes of action, the threshold adjudication of jurisdiction under the Act does not call for a final ruling on the merits of the claims. Thus, all that is before the Court on the present jurisdictional motion is whether the nature of the claims raised by Plaintiffs fall within the general categories of claims as to which Congress has conferred jurisdiction under 28 U.S.C. §§ 1330, 1605(a). On this point, Plaintiffs submit that there can be no doubt as to the Court's subject matter jurisdiction to adjudicate this controversy.

House Report, *supra*, at 13-14. Since Plaintiffs have satisfied both the subject matter and service requirements of the FSIA,[22] this Court may plainly exercise personal jurisdiction over the defendant. *See, e.g., Velidor v. L/P/G/ Venghazi*, 653 F.2d 812 (3d Cir. 1981); 1 J. Moore, Moore's Federal Practice § 0.66[6] (2d ed. 1982).

Even without this express articulation of the constitutional basis for statutory jurisdiction under the FSIA, it is readily apparent that on the allegations of the Amended Complaint personal jurisdiction can be exercised over Mexico without offending the minimun contacts requirements of the Due Process Clause. The Amended Complaint alleges that Mexico, for its own benefit, undertook extensive efforts in the United States to solicit Plaintiff's claims', to obtain evidence relating thereto, and to advance those claims in the United States. *See* Amended Complaint § 22. Mexico obtained substantial benefits through its use and release of Plaintiffs' claims, *id.* at § 29, and has had repeated communications both through the physical presence of its agents in this country and through correspondence to members of the Plaintiff class in this country relating to those claims and Plaintiffs' relationships with Mexico in connection with those claims. *Id.* at § 22, 31. In this contexty such solicitation, follow-up communication and other activities are more than sufficient to satisfy due process limitations. *Travelers Health Association v. Virginia*, 339 U.S. 643, 648 (1950) (continuing forum relationships stemming from solicitations by out-of-state entity); *International Shoe Co. v. Washington*, *supra; see Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958) (recognizing significance of solicitation activity).[23] Mexico's activities have caused economic losses to Plaintiffs in the United States, moreover, and thus would justify the exercise of personal jurisdiction even without Mexico's extensive solicitation activities within the United States. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (assumption of insurance obligation by out-of-state defendant is sufficient to confer personal jurisdiction). *See also Letelier v Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) (recognizing, in act-of-state context, that acts or omissions occurring within territorial border of foreign state may cause injury within the United States).[24]

[22] Defendant has stipulated and this Court has so ordered that service under the FSIA was made on December 4, 1981. *See* Order of December 10, 1981, 1.

[23] The contrast between Mexico's continuing course of conduct with Plaintiffs in the United States and the "one, isolated occurrence" at issue in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295, could not be more marked. Defendant's reliance on *World-Wide Volkswagen* is thus entirely misplaced. Not only did that case involve only a single, isolatd and "fortuitous" contact with the forum jurisdiction, but the contact in question was of plaintiffs' doinhg in driving their car through the forum. Here, the "minimum contacts" arise from defendant Mexico's own acts undertaken in the United States to secure substantial benefits for itself.

[24] Contrary to Mexico's argument, its contacts with the entire United States must be considered in determining whether this Court may exercise personal jurisdiction over it in this action. *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977), *rev'd sub nom. on other grounds, Stafford v. Griggs*, 444 U.S. 527 (1980); *Steinberg v. Intl. Criminal Police Orgs.*, No. 80-1336 (D.C. Cir. Oc-

Finally, the continuous and substantial general business contacts that Mexico has with the United States, Amended Complaint, §§ 57, 58, provide a separate basis for the constitutional exercice of personal jurisdiction. *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1036-37 (D.C. Cir. 1981); *Gatewood v. Fiat*, 617 F.2d 820 (D.C. Cir. 1980). Indeed, the rule that the cause of action may be independent of the defendant's other business activities for the constitutional exercise of personal jurisdictional purposes is widely followed. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 413 (9th Cir. 1977) (extensive citation of cases). Having purposely availed itself of the privilege of conducting extensive business in the United States, Mexico's assertion of lack of personal jurisdiction must plainly be rejected. *See Hanson v. Denckla*, 357 U.S. at 253; *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1974).

III. *PLAINTIFFS STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED.*

Mexico's argument that Plaintiffs have failed to state a claim upon which relief can be granted borders on the frivolous. A motion to dismiss under Rule 12(b)(6) may only be granted if it is clear beyond doubt that the plaintiff can prove no set of facts which would support its claim for relief. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Conley v. Gibson*, 355 U.S. 41 (1957); *Hudson v. Hardy*, 424 F.2d 854 (D.C. Cir. 1970) (must appear to a certainty that plaintiff is entitled to no relief under any state of facts which might be proved in support of claim). Here, Plaintiffs have asserted claims entitling them to relief not only under the 1941 Treaty between Mexico and the United States but also under international law, American law and mexican law itself.

As set forth *supra*, pp. 11-12, under international law a failure to pay appropriate compensation to those whose property is taken by a sovereign sta-

tober 23, 1981); *Gilson v. Republic of Ireland*, 517 F. Supp. 477, 483-84 (D.D.C. 1981). This principle has been recongnized and applied in other courts as well. *See, e.g., Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), *cert. denied*, 102S. Ct. 1012 (1982). *Cf.* Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv. L. Rev. 470 (1981). These holdings are also in accordance with the Supreme Court's admonition that "in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist." *United States v. Belmont*, 301 U.S. 324, 331 (1937). And Congress recognized the propriety of a national contacts approach in adopting a uniform nationwide service-of-process provision for use in suing foreign sovereigns under the FSIA. 28 U.S.C. § 1608. *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032 (D.C. Cir. 1981), relied on by the defendant, cannot be regarded as standing for any other proposition, since that was a diversity jurisdiction case in which plaintiff virtually conceded that the "aggregate contacts" approach would be a novel one and in which there was no clear expression of a strong federal interes in providing a forum for decision as exists here. The Court accordingly held that plaintiff had failed to demonstrate that defendant had minimum contacts with the relevant states.

te is a violation of law, irrespective of the propriety of the initial taking. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 887-93 (2d Cir. 1981); *American International Group, Inc. v. Islamic Rep. of Iran*, 493 F. Supp. 522, 524 n.1 (D.D.C. 1980), *aff'd in relevant part*, 657 F.2d 430 (D.C. Cir. 1981). Mexican law also recognizes an obligation to compensate the Plaintiffs for the taking of their property. Art. 27, Const. of United Mexican States.

Moreover, Plaintiffs have alleged rights under the 1941 Treaty by which Mexico released the United States from liability to Plaintiffs and assumed the obligation to pay Plaintiffs' claims. Contrary to Mexico's argument, there is ample authority that treaties — particularly treaties such as those involved here which have been negotiated for the protection of property rights or the settlement of claims — may give rise to an implied righ of action to the claimant-beneficiaries of such provisions.[25] *See, e.g., Great Western Insurance Co. v. United States*, 112 U.S. 193 (1884);[26] *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801);[27] *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 546-47 (D.D.C. 1981). *See also* 2 Wharton, Digest of International Law, § 246 at 566 (2d ed. 1887). *See generally American In-*

[25] Implied remedies are aided by the rule that treaties are to be interpreted liberally in determining whether private causes of action exist thereunder. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187, 193-94 (1961); *Neilsen v. Johnson*, 279 U.S. 47 (1929).

[26] In *Great Western*, the United States had released Great Britain from liability to Plaintiff under the Treaty of 1871. Pursuant to the treaty a fund was deposited in the American treasury for payment to the claimants that the United States had represented. In assessing the nexus between the 1871 Treaty and Plaintiff's claim, the Supreme Court stated:

> [A]ppellant's claim, . . . grows out of the stipulations of the Treaty. . . [t]he United States took charge of the claim of petitioner against Great Britain for the injuries inflicted by [it]; . . . [b]y a treaty . . . Great Britain stipulated that she would pay the claim to the United States, . . . Great Britain did pay . . . and the purpose of payment under the treaty . . . constitutes the foundation of appellant's claim. [T]he . . . recognition and payment of the claim grows out of the stipulation of the treaty. . . .
>
> [T]he government . . . became liable . . . under the treaty by which [Great Britain] was discharged and released from the claim of plaintiff. . . .
>
> The present is a case in which such assumption [by the United States of Great Britain's debt to appellant] is implied from the circumstances of the treaty and the receipt of the money.

112 U.S. at 199. In that case, the Court held that the Court of Claims did not have jurisdiction to hear plaintiff's claim as it was, by statute, excluded from hearing "any claim growing out of a treaty."

[27] In *United States v. Schooner Peggy* the Supreme Court sustained a claim by private French shipowners against the United States for the return of a vessel, holding that, under the Treaty of 1800 with France, plaintiffs had a right to the restoration of their vessel or payment therefor by the United States.

ternational Group v. Islamic Republic of Iran, 657 F.2d 430, 445 (D.C. Cir. 1981) (discussing *Schooner Peggy*).

Plaintiffs' Amended Complaint, therefore, plainly cannot be dismissed under Rule 12(b)(6). Unless the Act of State doctrine or sovereign immunity bar this Court from considering Plaintiffs' claims, they are entitled to relief. As shown previously, sovereign immunity does not bar this Court from exercising jurisdiction. Nor, as the Plaintiffs show below, do Mexico's act of state of limitations arguments justify dismissal of the Amended Complaint.

A. *The Act Of State Doctrine Is Not Applicable To These Claims.*

Mexico contends that this Court should dismiss this case by reason of the "act of state" doctrine. This contention is hardly amenable for decision on a motion to dismiss, requiring as it does an evidentiary showing by the foreign sovereign, with opportunity for appropriate discovery, that the affirmative defense of an actual act of state exists. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). In any event, Mexico's efforts to shield itself from this Court's jurisdiction under this doctrine is wholly unavailing, as recent decisions in this Circuit make clear.

In *American International Group, Inc. v. Islamic Republic of Iran*, 493 F.Supp. 522 (D.D.C. 1980), *aff'd in relevant part*, 657 F.2d 430, 445 (D.C. Cir. 1981), the assets of American insurance companies were nationalized by Iran without compensation in violation of a treaty with the United States. Despite the Court's jurisdiction under the FSIA, Iran asserted that the act of state doctrine precluded summary judgment. The Court rejected this contention aut of hand, ruling that the doctrine did not apply since the claims asserted did not call for an examination of the validity of Iran's expropriation, but for a judicial determination whether Iran had failed to provide compensation. The present case clearly parallels *American International*. Here, Plaintiffs are not asking this Court to judge the validity of Mexico's expropriation of Plaintiffs' claims against the United States. Rather, Plaintiffs complaint of Mexico's failure to provide for the payment of prompt, adequate and effective compensation. Under *American International's* reasoning, the act-of-state defense is unavailable to Mexico.[28]

[28] As a second independent basis of the *American International* decision the Court ruled that it was not applying a contested rule of decision but was merely applying the relevant treaty and rule of international law which required compensation. 493 F. Supp. at 525. The Court's implication that the act of state doctrine is not a rule of jurisdiction but a rule of decision is correct. Under the act of state doctrine a curt exercises jurisdiction but gives the foreign act the status of the rule of decision for the case. *See Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438-39 (1964); *Ricaud v. American metal Co.*, 246 U.S. 304, 309 (1918); *accord Empresa Cubana Exploladora De Azucar, inc. v. Lamborn Co.*, 652 F.2d 231, 239 (2d Cir. 1981); *Occ. of Umm at Qaywayn v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1200 n.4 (5th Cir. 1978); *Zweibon v. Mitchell*, 516 F.2d 594, 620 N.68 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976). *See Generally*

The act of state doctrine is a judicial creation which precludes American courts from examining the taking of property by a foreign government within its territory. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428 (1964). However, subsequent to *Sabbatino*, the Supreme Court limited the use of the doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976), where the Court ruled that the foreign government must *prove* the act of state and could not rely on the assertions of counsel that the failure to pay a debt was a sovereign act of state. The court rejected the act of state defense, stating:

> No statute, decree, order, or resolutin of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to consicate the amounts due three foreign importers.

425 U.S. at 695.[29]

Mexico's submission of the affidavit of Oscar Flores, Attorney General of the Mexican Republic, is apparently an attempt to meet its burden of proof. Mr.Flores reviewed and considered Plaintiffs' Amended Complaint and submitted the following sworn statement:

> [T]he Attorney General has concluded that and declares in this capacity as the Attorney General of the Republic that all acts and failures to act by officials or employees of the United Mexican States *that might have taken place* in connection with the claims advanced by Plaintiffs . . . are a part of the official functions and *would be* official acts of the Mexican State carried out on its behalf and in the exercise of its sovereign authority.

Defendant's Memorandum at 27, Exhibit A (emphasis added). But as proff of a sovereign "act of state" this Affidavit fails totally. Mr. Flores' statement is

Henkin, *Act of State Today: Recollections In tranquility,* 6 Colum J. Transnat'l L. 175, 178 (1967). Here, assuming *arguiendo* the applicability of the act of state doctrine, it is quite evident that all relevant Mexican sources of a rule of decision (*i.e.*, the Mexican Constitution, the 1941 Treaty and the 1941 Decree) require that Plaintiffs be justly compnsated. *Compare Meter v. White,* 65 U.S. (24 How.) 317 (1860) (Supreme Court, contary to local American law, applied a Mexican decree which recognized a debt owed to American nationals).

[29] The Court distinguished *Underhill v. Hernandez,* 168 U.S. 250 (1918), *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918) on the ground that the facts of those cases, involving the acts of military commanders in the contexi of civil wars, clearly indicated that sovereign authority was being exercised. *underhill, Oetjen* and *Ricaud.* Here, there is not exigent or military activity and, therefore, Mexico must meet its burden of proof in establishing an act of state.

equivocal. He refuses to specify what "acts" took place but adopts the "might have taken place" rubric in order to avoid admitting facts pleaded in the Amended Complaint. Moreover, he fails to state uniquivocally that the acts of the Mexican officials "are" official acts of Mexico but rather adopts the phrase "would be" and thus avoids committing Mexico to an official position. Mr.Flores' affidavit does not identify a single concrete act of Mexico. There is no precedent for the use of such a diluted, ineffectual statement of a public official as evidence of an act of state. *Compare Victory Transport Inc. v. Comisaria General,* 336 F.2d 354, 358-59 n.7 (2d Cir. 1964) (rejection of affidavit of Spanish consul as beign insufficient to establish sovereign immunity).[30]

The evident reason for this approach is that the only relevant decree concerning Plaintiffs' claims is the 1941 Decree, which expressly recognized Mexico's obligation to compensate Plaintiffs. There has been no intervening or superseding decree, legislation or other "act of state." This Court should therefore reject Mr.Flores' affidavit since it does not refer to any identifiable act of state but merely references actions that "might have taken place" of officials who were operating pursuant to no discernible Mexican policy or act.

Moreover, even if Mexico were able to establish some "act of state," in would be to no avail in this case since the property involved is not located within Mexico. It is undisputed that "our courts will not give extra-territorial effect to a confiscatory decree" of a foreign state "even where directed against its own nationals." *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972), *cert. denied,* 409 U.S. 1060 (1972); *see Alfred Dunhill of London Inc. v. Cuba,* 425 U.S. at 687. Since the situs of the debt is in the United States, even if a mexican confiscatory decree were issued, it would not be binding as a rule of decision in this Court. Mexico has argued that the debt is located in Mexico, stating; "In the contex of the act of state doctrine, 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." Defendat's Memorandum at 28-29. Yet, in each of the cases on which it relies the American courts were striving to *limit* the act of state doctrine and *prevent* foreign governments from seizing assets located in the United States. *See, e.g., 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. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); *United Bank Ltd. v.*

[30] Mexico's use of this equivocal device is particularly surprising in light of the Mexican Attorney General's prior successful experience in drafting a solid affidavit which carried the day in a previous act of state controversy involving Mexico. *D'Angelo v. Petroleos Mexicanos,* 422 F. Supp. 1280 (D.Del. 1976), *aff'd without opinion,* 564 F.2d 89 (3d Cir. 1977). In *D'Angelo* the Attorney General of Mexico submitted an affidavit defining the scope and affect of the 1938 Mexican oil expropriation decree, *i.e.*, the Mexican act of state. The affidavit was related to concrete acts of state: the 1938 expropriation decree and Global commission. Here, Mr. Flores' affidavit does not relate to any decree or acts of a commission but makes vague references to acts of inferior Mexican officials which "might have taken place."

Cosmsic 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).[31] Thus, the courts fashioned an exception to the normalo jurisdictional rule that a debt is located at the domicile of the creditor. *Compare Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas v. New Jersey*, 379 U.S. 674 (1965) (situs of debt at domicile of creditor). Moreover, since the debt stems from the expropriation of American real property rights, this debt retains the character of real rather than personal property and, as discussed previously, is located in the United States under any view.

It is well-settled that, in determining the location of an intangible, the Court is not bound by technicalities but may consider the aquities, especially in applying an admitted fiction or shifting concept. Thus, *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir. 1972), stated:

> However, in tracing ownership of United States property cast adrift by the "extraordinary and basically unfair measure" of expropriation without compensation, "our courts have developed a willingness to disregard technicalities in favor of equitable considerations." We accept the traditional explanation for the continuing dominion of former owners over property with an American situs: the former owners retain equitable title to the American property.

462 F.2d at 1028. Here, precedent and logic demosnstrate that the property in question is not within Mexico's territorial reach for act-of-state purposes.

In sum, Mexico may not avail itself of the act of state defense since it cannot satisfy the doctrine's essential conditions: (a) demonstrating that the validity of a governmental decree is being challenged; (b) proving an act of state; and (c) demonstrating its dominion over the parties and the debt.

[31] For instance, in *Tabacalera*, the Fifth Circuit refused to defer to Cuba's purported expropriation ecree since the transformation of the disputed accounts receivable into cash could only be accomplished in the United States. The court reasoned that Cuba did not have the power to perform a *fait acompli* in the nature of acquiring the *res* since the accounts receivable were convertible only in the United States. Thus, the Court concluded that the debt was not property in Cuba. 392 F.2d at 714-16. In *Menendez* the Second Circuit recognized the *Tabacalera* approach and fashioned this situs rule: "For purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce and collect it." 485 F.2d at 1364. In a later case the Second Circuit observed that in order to enforce the debt the foreign power had to have jurisdiction over the parties and the *res*. *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862-63 (2d Cir. 1981). Here, this court has personal jurisdiction over Mexico and is able to enforce its judgment under the FSIA. *see* 28 U.S.C. § 1610. Thus, even under Mexico's authority the debt is located in the United States.

[32] Mexico's argument that *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942) require dismissal of this case reflects a fundamental misunderstanding of those cases and Plaintiff's claims, and also contravenes the reading given to those decisions over the last 40 years. *See, e.g.*, Note, *United States v. Pink, A Reappraisal*, 48 Colum. L. Rev. 890 (1948). As the District of Columbia Circuit has indicated, these cases basically stand for the pro-

Mexico's final suggestion that this case should be dismissed because it would embarrass United States foreign relations or impede treaty negotiations must also be rejected. Federal courts have not hesitated to adjudicate questions properly within their jurisdiction, even where they involve "foreign policy concerns" of utmost sensitivity to the Executive Branch. *Eain v. Wilkes*, 641 F.2d 504, 515 n.15 (7th Cir. 1981).[53] Entertaining this lawsuit is, moreover, in no way inconsistent with the purpose or efect of the treaties between the United States and Mexico to extinguish Plaintiffs' claims *as against the United States*, to extinguish other claims as against Mexico, and for each sovereign to assume the responsibility for satisfying the claims of those whom it represented. Plaintiffs do not seek to undo the results of the treaties but to enforce an obligation assumed by Mexico under the 1941 Treaty to satisfy their claims.[54] Because "[I]t is emphatically the province and duty of the judicial department to say what the law is," *Marbuty v. Madison*, 1 Cranch 137, 177 (1803); *United States v. Nixon*, 418 U.S. 683, 703 (1974), Mexico's effort to avoid this Court's jurisdiction on policy grounds must be rejected.

position that local assets may be marshaled for the benefit of local creditors before claims of creditors outside the state or nation are paid. *Nielsen v. Secretary of treasury*, 424 F.2d 833, 846 (D.C. Cir. 1970). *Pink* and *Belmont* arose out of the "Litvinov assignments," by which the United States finally granted formal recognition to the Russian government and, at the same time, became assignee of certain assets of Russian insurance companies, located in the United States, and subject to a formal Russian expropriation decree. These assets were assigned to the United States in order to satisfy claims by American nationals against Russia. Alien creditors objected to the United States' exercise of its asigment, but the priority of the United States was sustained.
In upholding the validity of the executive agreements between the United States and Russia, the Supreme Court in effect also upheld the court's power to *enforce* a claims settlement agreement, permitting the United States, for the benefit of its citizens, to marshal the Russian assets pursuant to the executive understanding. *See generally* 315 U.S. at 227-28. Mexico's extraordinarily broad reading of those cases is totally inconsistent with the Supreme Court's recent recognition that a taking claim might arise out of the Algerian accords, *Dames & Moore v. Regan*, *supra*, at 2001, *id.* at 2992-93 (Powell, J.), and with numerous decisions of our Court of Appeals limiting *Belmont* and *Pink* to their factual contexts. *See American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 445 (D.C. Cir. 1981); *Zweibon v. Mitchell*, 516 F.2d 594, 621 (D.C. Cir. 1975); *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 846 (D.D.Cir. 1970).

[53] As its legislative history demonstrates, the FSIA was designed in large part to fully transfer from the executive branch (the State Departament) to the courts the obligation for determining whether sovereign immunity should be recognized as a jurisdictional bar to suits against foreign states. House Report, *supra*, at 7; *accord, National Airmotive Corp. v. Government and State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980).

[54] It bears noting that the circumstances giving rise to this case are unusual and selflimiting: Mexico is the only contiguous foreign state from which present American territory was annexed and which, therefore, has the legal and historical ties necessary to have asserted claims of American citizens and residents against the United States, to settle those claims and to assume the obligation to satisfy them.

B. *The Statute Of Limitations Does Not Bar Plaintiffs' Claims.*

Mexico maintains that the three-year District of Columbia statute of limitations bars Plaintiffs' claims. This challenge is without substance and is, in any event, premature.

The applicability of a statute of limitations is a question rarely suitable for adjudication on a motion to dismiss, since the determination of facts critical to establishing a bar or demonstrating that the statute must be tolled often requires discovery or, at the least, complete presentation of both parties' allegations, *Richards v. Mileski,* 662 F.2d 65, 73 (D.C. Cir. 1981) (overruling the district court's dismissal of a defamation claim based on events occurring twenty-three years before Amended complaint was filed and observing "an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense"); *Jones v. Rogers Memorial Hospital,* 442 F.2d 773, 775 (D.C. Cir. 1971) (holding statute of limitations defense cannot be decided on a motion to dismiss "unless it appears beyond doubt" that plaintiff cannot prove facts entitling him to relief). *See also Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 235 (1959) (holding question of plaintiff's diligence "cannot be decided" on instant motion to dismiss). In this case, it is apparent that discovery and a responsive pleading by Mexico are needed to ensure complete development of the facts regarding Plaintiffs' allegations of Mexico's repeated written acknowledgments of its debts to Plaintiffs and of its continuing course of conduct, in which it has admitted liability and promised payment in the future, that would toll any applicable period of limitations.

The Amended Complaint alleges a series of acts – from 1941 to the present – which support Plaintiffs' claim that any limitations period has been tolled or renwed.[35] *See, e.g.,* Amended Complaint §§ 30, 31, 33, 38, 39, 42, 43, 44, 45, 46, 47, 52, 53, 54 and Exhibits E and F thereto. These and other allegations of the Amended Complaint demonstrate at least two bases for tolling any limitations period.

First, Defendant has given written acknowledgment of its debt – both in letters to members of the plaintiff class and in its own official records – within the statutory period. Where a new promise or an acknowledgment of a debt, in writing, is made, the running of the limitations perid begins anew. D.C. Code Ann. § 28-3504 (1981); *Heffelfinger v. Gibson,* 290 A.2d 390 (D.C. 1972). The courts of the District of Columbia have long held that a "Distinct

[35] Section 12-301 of the D.C. Code provides a 15 year statute of limitations for the recovery of lands, tenements or hereditaments. D.C. Code Ann. § 12-301(1) (1981). Section 12-301 futher directs that actions (i) for the recovery of personal property, (ii) on a simple contract, express or implied, and (iii) for which a limitation is not otherwise specially prescribed, may not be brougt more than three years after accrual. D.C. Code Ann. § 12-301(2), (7), and (8) (1981). In view of Plaintiffs' tolling allegations, the court need not now decide which limitations period, if any should be applied, *cf. Blankenship v. Boyle,* 329 F. Supp. 1089 (D.D.C. 1971), or when Plaintiffs' cause of action accrued.

and unequivocal acknowledgment of the debt as a still subsisting personal obligation constitutes an implied promise to pay it, and takes the contract out of the statute," *Heffelfinger v. Gibson*, 290 A.2d at 394, *citing Hayden v. International Banking Corp.*, 41 F.2D 107 (1930); *Breen v. Reeves*, 47 App. C.C. 83 (1917). *See also Shepherd v. Thompson*, 122 U.S. 231 (1887) (applying D.C. law); *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 451 (D.C.Cir. 1972). And a promise sufficient to trigger a new statutory period need not be made within the original limitations period. *Stern Equipment Co. v. Pogue*, 177 A.2d 447, 448 (D.C. 1955). As the Amended Complaint alleges, there have been many such "distinct and unequivocal" acknowledgments of Mexico's debt, some occurring within two years of the filing of this action on September 18, 1981, and Plaintiffs expect that discovery will reveal further evidence of such acknowledgment.

Second, Plaintiffs propose to establish that Mexico is estopped by its conduct from raising limitations as a bar. The principle of equitable estoppel justly removes the statute of limitations from the arsenal of a defendant who by its conduct or representations — written *or* oral — has caused an adversary, in reasonable reliance on that conduct, to let the statutory period run. *Alley v. Dodge Hotel*, 551 F.2d 442 (D.C. Cir.), *cert. denied*, 431 U.S. 958 (1977); *Brown v. Lamb*, 414 F.2d 1210 (D.C.Cir. 1969), *cert.denied*, 397 U.S. 907 (1970); *Howard University v. Cassell*, 126 F.2d 6 (D.C. Cir. 1941). Plaintiffs herein reasonably relied on Mexico's repeated statements of its intetion to honor these debts, expending, for example, considerable sums responding to Mexico's requests for documentation of certain representative claims. The reasonableness of Plaintiffs' participation in and reliance upon the nonlitigative path onto which Mexico invited them seemed apparent when, in January, 1980, Plaintiffs were advised that Mexico was now ready to pay compensation. Under these circumstances, Mexico cannot equitably be heard to claim that Plaintiffs waited too long to resort to the courts, since it was Mexico's own conduct that caused Plaintiffs' reasonable forbearance. *See also Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

Plaintiffs submit that they have alleged circumstances more than sufficient at this preliminary stage to support the claims of acknowledgment and estoppel. Since the resolution of these issues will require discovery and possibly an evidentiary hearing, the limitations defense cannot be determined on the present record.

CONCLUSION

Accordingly, and for all of the foregoing reasons, Mexico's motion to dismiss should be denied.

Respectfully submitted,

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