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**SOVEREIGN IMMUNITY-IMMOVABLE PROPERTY EXCEPTION OF  
THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976  
(Asociacion de Reclamantes v. United Mexican States)**

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SOVEREIGN IMMUNITY—IMMOVABLE PROPERTY EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976—*Asociacion de Reclamantes v. United Mexican States*<sup>1</sup>

I. INTRODUCTION

Traditionally, a foreign sovereign was immune from suit in the courts of the United States regardless of the suit's basis.<sup>2</sup> This absolute theory of sovereign immunity remained in effect until the 1950's when a more restrictive theory of sovereign immunity was espoused.<sup>3</sup> Difficulties arose, however, in applying this restrictive theory<sup>4</sup> and as a result, Congress passed the Foreign Sovereign Immunities Act of 1976<sup>5</sup> (FSIA).

The FSIA is founded on the general premise that a foreign sovereign is immune from jurisdiction of the United States courts<sup>6</sup> and then proceeds to establish exceptions<sup>7</sup> to this general rule.<sup>8</sup> One exception that has rarely been invoked, and is the focus of this comment, is the exception for cases concerning rights to immovable property situated

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1. 735 F.2d 1517 (D.C. Cir. 1984).

2. See *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812). This case involved the issue of ownership of a public vessel taken under orders of Napoleon, Emperor of France, from citizens of the United States. *Id.* at 117. The Court held that a public vessel of a foreign sovereign at peace with the United States coming into its ports, and demeaning itself in a friendly manner, is exempt from the jurisdiction of the United States. *Id.* at 146.

3. See *infra* notes 84-120 and accompanying text.

4. *Id.*

5. Foreign Sovereign Immunity Act (FSIA) Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611 (1982)) [hereinafter FSIA].

6. H.R. REP. No. 1478, 94th Cong., 2d Sess. 17, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6616-21 [hereinafter HOUSE REPORT]. Sovereign immunity is an affirmative defense which must be pleaded, thus the burden is on the foreign state to produce sufficient evidence in support of its immunity claim.

7. These exceptions are set forth in 28 U.S.C. § 1605 (1982). They include: (1) a foreign state's waiver of its immunity (§ 1605(a)(1)); (2) an action based on a foreign state's commercial activity carried on in the United States (§ 1605(a)(2)); (3) any case in which rights in property taken in violation of international law are at issue and the property is in the United States (§ 1605(a)(3)); (4) any case in which rights in property in the United States acquired by succession or gift or immovable property are at issue (§ 1605(a)(4)); and (5) an action based upon the tortious act or omission of a foreign state or their employees (§ 1605(a)(5)).

8. See HOUSE REPORT, *supra* note 6, at 7.

in the United States.<sup>9</sup> This is known as the "immovable property" exception and is codified in section 1605(a)(4) of the FSIA.<sup>10</sup>

Recently, in *Asociacion de Reclamantes v. United Mexican States*<sup>11</sup> the "immovable property" exception was invoked against Mexico.<sup>12</sup> The United States Court of Appeals for the District of Columbia, in deciding that Mexico was immune from United States jurisdiction,<sup>13</sup> stated that the exception was not to be given the most expansive interpretation possible, but rather was to be narrowly construed.<sup>14</sup> Thus, the D.C. Circuit held that the phrase "rights in immovable property," as set forth in the FSIA,<sup>15</sup> was not intended to encompass rights to compensation traceable historically to title disputes over United States land which has been settled by international agreement.<sup>16</sup> The D.C. Circuit also reaffirmed an established principle of the "tortious act" exception<sup>17</sup> of the FSIA, namely, that the tort in whole must occur in the United States for the exception to be applicable.<sup>18</sup>

## II. BACKGROUND

The case involves a class action brought by the *Asociacion de Reclamantes* and six individuals, seeking compensation from the

9. There is only one other reported case applying the immovable property exception. See *County Board of Arlington County v. Government of the German Democratic Republic*, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978), reprinted in 17 *I.L.M.* 1404 (1978).

10. 28 U.S.C. § 1605(a)(4) (1982) provides:

(a) a foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case

...

(4) 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.

*Id.*

11. 735 F.2d at 1517.

12. *Id.* at 1520.

13. The D.C. Circuit affirmed the decision of the district court that the FSIA grants immunity to Mexico. *Id.* at 1520. See 561 F. Supp. 1190 (D.D.C. 1983).

14. 735 F.2d at 1521.

15. 28 U.S.C. § 1605(a)(4) (1982).

16. 735 F.2d at 1523.

17. 28 U.S.C. § 1605(a)(5)(1982). Section 1605(a)(5) in part creates an exception to foreign sovereign immunity for cases not otherwise encompassed by the exception for a foreign state's commercial activity (§ 1605(a)(2)), in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious conduct or omission of that foreign state. It also applies to officials and employees of the foreign state while acting within the scope of his office of employment. *Id.*

18. See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984); *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358, 362 (N.D. Ill. 1983); *In re Sedco*, 543 F. Supp. 561, 567 (S.D. Tex. 1982).

United Mexican States ("Mexico") for its alleged taking and conversion of certain land grant related claims possessed by plaintiffs or their ancestors.<sup>19</sup> The plaintiffs claim to be or to represent the successors in interest to recipients of 433 land grants from the King of Spain or the Republic of Mexico<sup>20</sup> that are now located in Texas.<sup>21</sup> The original grantees, Spanish and Mexican citizens, were allegedly driven from this land and divested of title by the United States and Texas after the Mexican-American War.<sup>22</sup> These actions occurred in spite of provisions contained in the 1848 Treaty of Guadalupe Hidalgo<sup>23</sup> which explicitly protected those landowners' rights to title and use of the land.<sup>24</sup> Thus, at this time, these landowners may have possessed actionable claims against the United States.<sup>25</sup>

In the early 1920's, a new Mexican Government espoused the 433 land claims and asserted these against the United States.<sup>26</sup> In 1923, Mexico and the United States concluded the Treaty on General Claims.<sup>27</sup> This treaty created a General Claims Commission which would evaluate the claims of each country's nationals.<sup>28</sup> In 1936, the authority for the Commission to evaluate claims expired<sup>29</sup> and none of

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19. *Asociacion de Reclamantes v. United Mexican States*, 561 F. Supp. 1190 (D.C. Cir. 1983). As will be discussed later, this is the lower court's decision which found jurisdiction lacking under the FSIA, and alternatively, that the act of state doctrine precluded adjudication of the merits.

20. *Id.* at 1192 n.1. The appellate court noted that Mexico has not contested the historical account proffered by the appellants. 735 F.2d at 1519 n.1.

21. The land grants in question consist of approximately 12 million acres of land lying principally between the Rio Grande and the Nueces River in South Texas. 561 F. Supp. at 1192 n.1.

22. *Id.* at 1192.

23. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, art. VIII, 9 Stat. 922, T.S. No. 207, at 929.

24. Pursuant to the Treaty of Guadalupe Hidalgo, sovereignty over Texas was transferred from Mexico to the United States. *Id.* at 922. Article VIII provides that Mexican citizens could remain on the land and retain title as Mexican or American citizens. The present owners, their heirs and all Mexicans that acquired the property by contract, would enjoy the guarantees with respect to the property as if it belonged to United States citizens. *Id.* at 929-30.

25. Claims could have been asserted for restoration of title and possession but, as the court notes, the complaint did not assert that they were ever pursued in United States courts. 735 F.2d at 1519.

26. *Id.*

27. Treaty on General Claims, Sept. 8, 1923, United States-Mexico, 43 Stat. 1730, T.S. No. 678.

28. *Id.* Art. I at 1730. The Commission was directed to quantify the number and size of the claims, and to the extent the aggregate claims of the citizens of one nation exceeded the other nation's claims, the difference would be paid sovereign to sovereign. *Id.* Art. IX at 1736.

29. 735 F.2d at 1519 n.2. The Commission heard cases until 1931. In 1934 the Com-

the 433 land claims had been evaluated.<sup>30</sup> In 1938, however, new negotiations had begun between the two sovereigns and the land claims were espoused again.<sup>31</sup> These negotiations ended in 1941, yielding the Treaty on Final Settlement of Certain Claims.<sup>32</sup> In sum, the Treaty required each sovereign to assume the obligation of satisfying the espoused claims of its own nationals.<sup>33</sup> By the Treaty's terms, Mexico released the United States from liability on all claims, including the 433 Texas land claims.<sup>34</sup>

### III. PROCEDURAL HISTORY

The plaintiffs filed their initial class action in September of 1981 based upon Mexico's failure to satisfy a single claim in the more than forty years since the 1941 Treaty was signed.<sup>35</sup> They asserted that, despite Mexico's acknowledging its obligation many times,<sup>36</sup> no legislation providing for compensation had been enacted.<sup>37</sup> It was argued by plaintiffs that Mexico's release of the United States from liability on the 433 land claims, in exchange for valuable considerations,<sup>38</sup> constituted a use and taking of those claims by Mexico for its own public purposes.<sup>39</sup> As a result, they claim Mexico became obligated to pay just, effective and prompt consideration.<sup>40</sup>

The case came before the United States District Court for the District of Columbia on a motion to dismiss.<sup>41</sup> Mexico asserted that the

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mission was replaced by two claims appraisers whose authority to evaluate claims expired in 1936. See General Claims Protocol, Apr. 24, 1934, United States-Mexico, 49 Stat. 3531, E.A.S. No. 57.

30. 735 F.2d at 1519.

31. *Id.* The Court stated that these negotiations were precipitated by Mexico's expropriation of oil producing property, owned by United States citizens without guarantees with respect to the property as if it belonged to United States citizens. *Id.* at 929-30.

32. Nov. 19, 1941, United States-Mexico, 56 Stat. 1347, T.S. No. 980 [hereinafter 1941 Treaty].

33. *Id.* art. III, at 1350.

34. *Id.* art. I, at 1348.

35. 561 F. Supp. at 1193.

36. *Id.* Mexico acknowledged its obligation by presidential decree shortly after the treaty was signed. Decree of President Camacho, Dec. 9, 1941, published in *El Diaro Oficial*, Dec. 31, 1941. In addition, assurances of payment are alleged to have been made as recently as 1970. *Id.*

37. *Id.*

38. The total amount of claims released against Mexico was in excess of \$193 million. 561 F. Supp. at 1192.

39. 561 F. Supp. at 1192-93.

40. *Id.* at 1193.

41. *Id.* at 1191. FED. R. CIV. P. 12(b)(1), (6) (1984).

court lacked jurisdiction<sup>42</sup> to hear the case and, as a sovereign, was immune from the court's power.<sup>43</sup> Plaintiffs contended that jurisdiction existed under the FSIA "immovable property"<sup>44</sup> and "tortious act" exceptions<sup>45</sup> and sought to recover damages from the Mexican sovereign for its uncompensated taking of the Texas land claims.<sup>46</sup>

The district court held that jurisdiction was lacking and dismissed the complaint.<sup>47</sup> The court stated that the "immovable property" exception contained two independent triggering clauses.<sup>48</sup> The first clause dealt with the rights in property in the United States acquired by succession or gift and the second related to rights in "immovable property" situated in the United States.<sup>49</sup>

In connection with the first clause, plaintiffs argued it was intended to deal with all kinds of property acquired by succession or gift.<sup>50</sup> The second clause, they argued, was drafted to deal with rights in "immovable property."<sup>51</sup> These contentions were one of two arguments proffered by plaintiffs.<sup>52</sup>

In their second argument, they alternatively asserted that their claims arose from rights in "immovable property," as well as inherited intangible property located in the United States (i.e., claims).<sup>53</sup> The district court disagreed with both arguments.<sup>54</sup>

In their first argument, plaintiffs tried to establish that their claims were a "usufructuary interest"<sup>55</sup> and thus a right in "immovable property." This argument assumed that they had a colorable legal right to title in 1923 when Mexico and the United States considered the claims.<sup>56</sup> The court noted, however, that plaintiffs never alleged they had title to the land in 1923 or that they attempted to regain title in a

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42. Pursuant to 18 U.S.C. §§ 1330, 1604 (1982), the FSIA provides the sole basis for subject matter jurisdiction against foreign states.

43. 561 F. Supp. 1191.

44. 28 U.S.C. § 1605(a)(4).

45. 28 U.S.C. § 1650(a)(5).

46. 561 F. Supp. 1191.

47. *Id.* at 1201.

48. *Id.* at 1196.

49. *See* 28 U.S.C. § 1605(a)(4).

50. Including real, personal or intangible property, 561 F. Supp. at 1196.

51. They assert that both clauses apply to its claims against Mexico. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. In civil law, a "usufructuary interest" refers to the right of enjoying a thing, the property of which is vested in another and to draw from it all the profit, utility and advantage which it may produce. *See* LA. CIVIL CODE ANN. ARTS. 535 (West 1980).

56. 561 F. Supp. at 1196.

legal forum prior to that time.<sup>57</sup> Because the underlying controversy did not involve an action to quiet title or to recover money derivative of real property rights, the court held that the claims involved intangible property rights created through the diplomatic process and not rights in "immovable property."<sup>58</sup>

As to plaintiffs' second argument, that their claims fell within the meaning of inherited property, the court stated "the plaintiffs adopt an expansive interpretation."<sup>59</sup> This interpretation of the FSIA section would state that any claim involving inherited property (real, personal or intangible) would be excepted from the sovereign immunity rule.<sup>60</sup> The court asserted that this interpretation would be contrary to the FSIA's purpose,<sup>61</sup> namely, codifying the restrictive principles of sovereign immunity.<sup>62</sup>

In addition, the district court found the "tortious act"<sup>63</sup> exception inapplicable because the Mexican conduct at issue fell within the "discretionary act"<sup>64</sup> exception to section 1605(a)(5).<sup>65</sup> The plaintiffs reasoned that Mexico assumed the duty to compensate them in the 1941 Treaty<sup>66</sup> and that the continuing failure to provide compensation constituted a conversion of their claims.<sup>67</sup> The court described the evaluation, financing and payment of these claims as judgments that raise substantial and serious questions of fiscal policy and the allocation of limited resources.<sup>68</sup> The court reasoned that these considerations were high level policy judgments requiring deference to the expertise and

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57. *Id.* The Court of Appeals for the District of Columbia rejects this analysis because such allegations did not appear in the amended complaint. See 735 F.2d at 1520 n.4.

58. 561 F. Supp. at 1197. *Cf.* Matter of Rio Grande, 516 F. Supp. 1155, 1160 (S.D.N.Y. 1981) (a liability compensation fund is not real estate and thus not immovable property).

59. *Id.*

60. The court states that every dispute with a foreign sovereign necessarily involves these kinds of intangible rights. *Id.*

61. See HOUSE REPORT, *supra* note 6, at 7.

62. 561 F. Supp. at 1197.

63. 28 U.S.C. § 1605(a)(5).

64. 28 U.S.C. § 1605(a)(5) provides that the tort exception shall not apply to: (A) any claim based upon the exercise or performance or the failure to exercise or perform a *discretionary function* regardless of whether the discretion be abused. (emphasis supplied).

65. 561 F. Supp. at 1198.

66. See *supra* note 23.

67. 561 F. Supp. 1197.

68. *Id.* at 1198. See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION [hereinafter HENKIN] (1972) (the court has refused to scrutinize any settlement and has affirmed that Congress has discretion to decide whether, and how, and to what extent compensation is due to the original claimants). *Id.* at 262.

discretion of the sovereign.<sup>69</sup> Thus, the district court decided to defer under 28 U.S.C. section 1605(a)(5)(a)<sup>70</sup> to the expertise of the Mexican Government, regardless of whether that judgment was an abuse of discretion.<sup>71</sup> Therefore, the alleged conversion of the land claims extended beyond the parameters of federal subject matter jurisdiction.<sup>72</sup> Moreover, the court noted an additional basis for declining jurisdiction, namely, that even assuming *arguendo* that Mexico converted the claims and committed a tortious act, the tort occurred in Mexico and did not affect property in the United States.<sup>73</sup>

The district court also held, alternatively, that the act of state doctrine<sup>74</sup> would prohibit adjudication of the merits of the complaint even if jurisdiction existed.<sup>75</sup> The court stated that judicial intervention would directly interfere with the historical authority of the executive and legislative branches in negotiating, signing and ratifying treaties.<sup>76</sup> This is because there is a long history of governmental action compensating United States citizens out of foreign assets in this country for wrongs done them by foreign governments abroad.<sup>77</sup>

The plaintiffs appealed the order of the district court to the United States Court of Appeals, District of Columbia Circuit.<sup>78</sup> Judge Scalia, writing for the court, characterized the case solely as one of statutory interpretation.<sup>79</sup> The issue was framed by the court as follows: "Whether Congress, in enacting the FSIA, intended the phrase 'rights in immovable property' to be broad enough to encompass rights

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69. 561 F. Supp. at 1198.

70. See *supra* note 64.

71. 561 F. Supp. at 1198.

72. 28 U.S.C. § 1330(a)(1982). Because the tortious act exception is inapplicable, the court lacks jurisdiction.

73. 561 F. Supp. at 1198.

74. The classic formulation of the act of state doctrine appears in the Supreme Court's decision in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment of the acts of the government of another done within its own territory. Redress of grievances by reasons of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

*Id.*

75. 561 F. Supp. at 1200.

76. The court wanted to avoid a ruling that would hold Mexico in violation of Mexican law for failing to compensate plaintiffs. Such a ruling, stated the court, would seriously damage the lawful and apparent authority of the United States negotiators. *Id.* See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

77. See *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 112 (2d Cir.), *cert. denied*, 395 U.S. 898 (1966).

78. 735 F.2d 1517.

79. *Id.* at 1518.



to compensation traceable historically to disputes over title to American land, which disputes have been settled by international agreement."<sup>80</sup> The D.C. Circuit decided that compensation claims were not intended to be included within the parameters of the FSIA exceptions.<sup>81</sup> Because the court lacked jurisdiction under the FSIA, it had neither need nor power to reach the act of state doctrine.<sup>82</sup> Thus, Mexico was granted immunity and the order of the district court was affirmed on the sole basis of the FSIA.<sup>83</sup>

#### IV. IMMOVABLE PROPERTY RIGHTS AND THE FSIA

Sovereign immunity is an internationally recognized doctrine under which the courts of one state will decline to exercise jurisdiction over another state without its consent.<sup>84</sup> At first, the absolute theory of immunity prevailed, affording foreign states immunity from all suits.<sup>85</sup> But, with an increase in the participation of states and individuals in commercial activities with foreign entities, a trend developed toward restricting the scope of state immunity to suits based on foreign acts.<sup>86</sup> This "restrictive theory" of sovereign immunity was formally adopted by the United States in 1952.<sup>87</sup> Under this restrictive theory, foreign sovereigns are accorded immunity with regard to their public acts (*actiones jure imperii*), but not with respect to their commercial acts (*actiones jure gestionis*).<sup>88</sup> There remained, however, substantial uncertainty as to the outcome of any given case, mainly due to the absence of a consistent method for distinguishing between public acts and pri-

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80. *Id.* at 1520.

81. *Id.* at 1524.

82. *Id.* at 1520.

83. *Id.*

84. HOUSE REPORT, *supra* note 6, at 8.

85. Kahale, *Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine*, 6 FORDHAM INT'L L.J. 391, 392 (1982-83). See also *The Schooner Exchange*, 11 U.S. (7 Cranch) at 116. (recognition of immunity is supported by the law practice of nations).

86. Kahale, *supra* note 85, at 392. See *Victory Trans. Inc. v. Comisaria Gen. de Abastecimientos*, 336 F.2d 354, 360 (2d Cir. 1964) (restrictive theory is designed to "accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.").

87. The Department of State adopted this position in the "Tate Letter." Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Philip Perlman, Acting Attorney General of the United States (May 19, 1952), 26 DEP'T. ST. BULL. 984 (1952), reprinted in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 647 (1976).

88. HOUSE REPORT, *supra* note 6, at 7.

vate acts.<sup>89</sup>

It was with these difficulties in mind that Congress codified the restrictive theory of sovereign immunity in the FSIA, in 1976.<sup>90</sup> Congress selected the "nature of the act" test for determining whether a particular act was public or private.<sup>91</sup> The FSIA sets forth the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States,"<sup>92</sup> and then subjects this rule to exceptions for specific categories of cases.<sup>93</sup> It is important to keep in mind that the FSIA provides the sole basis for subject matter jurisdiction over suits against foreign states.<sup>94</sup>

Two of the rarely employed exceptions to sovereign immunity that apply to both public and private acts are the "immovable property"<sup>95</sup> and "tortious act"<sup>96</sup> exceptions. Turning first to the "immovable property" exception, each of these exceptions will be discussed.<sup>97</sup>

The term "rights in immovable property" is susceptible to many different meanings depending upon the area of law for which that characterization of an interest may be relevant.<sup>98</sup> What is important in this instance is what Congress meant by the phrase in the FSIA.<sup>99</sup> The

89. Kahale, *supra* note 85, at 393. See 336 F.2d at 358-62; *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137-46; see also Note, *Judicial Authority and Presidential Competence: Conflicting Powers Affecting Claims Against Foreign States*, 3 N.Y.J. INT'L & COMP. L. 193, 210 (1982), wherein it was stated:

Chief Justice Marshall then meticulously evaluated the facts of the case, the principles to be applied, the need to balance the previously recognized common interest in orderly commerce and the demands for respect by the sovereign nations. In this analysis he distinguished those acts of the sovereign which were public acts from those acts which were commercial in nature, thus foreshadowing the *jure imperii—jure gestionis* distinction, before extending immunity to the warship.

90. The legislative history indicates that the codification of the "restrictive theory" of sovereign immunity was the primary purpose of the FSIA. See HOUSE REPORT, *supra* note 6, at 7.

91. Kahale, *supra* note 85, at 393 n.13. Under this test, the nature of the act, rather than the purpose for which it is being performed, is considered to be the controlling factor.

92. 28 U.S.C. § 1604 (1982).

93. 28 U.S.C. §§ 1605-1607 (1982).

94. 28 U.S.C. §§ 1330, 1604 (1982).

95. 28 U.S.C. § 1605(a)(4) (1982).

96. 28 U.S.C. § 1605(a)(5) (1982).

97. See *infra* text and accompanying notes 98-120.

98. See I.G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, § 19, at 74 (1980 Replacement) (immovability not a final test as between real and personal property).

99. The court states: "[o]ur job, however, is not to give the term the most expansive reading possible, nor to extract from different sources of law an artificial consensus definition of the term, but to determine what Congress meant by the language in this partic-

legislative history of section 1605(a)(4) states that the "immovable property" exception was established to codify the pre-existing real property exception to sovereign immunity recognized by international practice.<sup>100</sup> As noted in other texts,<sup>101</sup> this practice refused to extend foreign sovereign immunity to "an action to obtain possession of or establish a property interest in 'immovable property' located in the territory of the state exercising jurisdiction."<sup>102</sup> Thus, immunity is extended for claims arising out of a foreign state's ownership or possession of "immovable property" when this ownership or right to possession is not being contested.<sup>103</sup>

The origin of this traditional exception is rooted in the fundamental policy that a territorial sovereign has a primary interest in resolving all disputes over real property within its domain.<sup>104</sup> Another concern is that courts, outside of the jurisdiction where the land is located, are not well suited to decide property interests or rights to possession regarding such land, especially if it is in a foreign country.<sup>105</sup> The exception to sovereign immunity, as well as the "local action rule,"<sup>106</sup> were by-products of these considerations.

The FSIA "immovable property" exception, like the traditional real property exception it was meant to codify, is directed to disputes directly involving property interests or rights to possession.<sup>107</sup> This is borne out by the examples used by Congress to illustrate the types of actions to which section 1605(a)(4) is applicable; suits involving "questions of ownership, rent, servitudes and similar matters."<sup>108</sup> This is also consistent with the single reported case interpreting section 1605(a)(4), *County Board of Arlington County v. Government of the German*

ular statute." 735 F.2d at 1521.

100. HOUSE REPORT, *supra* note 6, at 20.

101. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 68(b) (1965) [hereinafter RESTATEMENT]. Accord, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 455(1)(c) (Tent. Draft No. 2, 1981).

102. *Id.* See also HOUSE REPORT, *supra* note 6, at 20.

103. RESTATEMENT, *supra* note 102, at § 68 comment d. An example is a negligence suit for injury suffered by a private individual while on the foreign state's property. *Id.*

104. F. WHARTON, CONFLICT OF LAWS § 278, at 636 (3d. ed. 1905) (each State has a fundamental policy as to the tenure of land. A sovereign cannot safely permit a foreign power to determine title to its land).

105. See *Reasor Hill Corp. v. Harrison*, 220 Ark. 521, 523; 249 S.W.2d 994, 995, (1952).

106. The local action rule makes the locality power exclusive and deprives other courts of jurisdiction to settle questions involving real estate. See *Griner v. Trevino*, 207 S.W. 947 (Tex. Civ. App. 1918); I.G. THOMPSON, *supra* note 98, § 24, at 24 (courts of one state cannot create an interest in real estate situated in another state).

107. See HOUSE REPORT, *supra* note 6, at 20.

108. *Id.*

*Democratic Republic*.<sup>109</sup> In that case, a foreign sovereign was being sued by a county taxing authority for delinquent real estate taxes on property located in the county.<sup>110</sup> A prayer for declaratory judgment that the property should be subject to the lien of the county, as provided by the state statute, was added to the complaint.<sup>111</sup> With regard to amenability to suit under section 1605(a)(4), the court stated, "Whether or not the issue of rights in 'immovable property' is present . . . the issue will be a specific matter for the court's attention in determining the question of the county's lien . . . ." <sup>112</sup>

The other FSIA exception at issue in the instant case is the "tortious act" exception embodied in section 1605(a)(5).<sup>113</sup> As the legislative history notes, this section was directed primarily at the problem of traffic accidents caused by officials and employees of foreign sovereigns in the United States.<sup>114</sup> Thus, the "tortious act" exception denies immunity as to claims for personal injury or death, or for damage to or loss of property caused by the tortious act or omission of a foreign state or its officials.<sup>115</sup>

Section 1605(a)(5) is ambiguous as to whether both the tort and the injury must occur in the United States or whether the tort may occur abroad while the injury is suffered here.<sup>116</sup> This ambiguity, however, seems to go no further than the language of the text. The legislative history makes clear that the "tortious act or omission must occur within the jurisdiction of the United States."<sup>117</sup> As one court stated, "[T]he briefest consideration of the purpose of [section 1605(a)(5)] shows . . . both the tort and the injury must occur in the United States" for section 1605(a)(5) to be applicable.<sup>118</sup> It is against this background of two FSIA exceptions, that the D.C. Circuit examined the claims of appellants in the instant case.<sup>119</sup>

109. *County Board of Arlington County v. Government of the German Democratic Republic*, No. 78-293-A (E.D. Va. Sept. 6, 1978), reprinted in 17 I.L.M. 1404 (1978).

110. *Id.* at 1404.

111. *Id.*

112. *Id.* at 1405. In *Arlington County*, the county lien would be the servitude.

113. 28 U.S.C. § 1605(a)(5).

114. HOUSE REPORT, *supra* note 6, at 21-22.

115. *Id.* at 22. The official or employee must be acting within the scope of his official capacity. *Id.*

116. See *Persinger*, 729 F.2d at 842. Cf. *Frolova*, 558 F. Supp. at 362 (act or omission must occur in the United States) with *Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980) (only the tortious injury need occur in the United States).

117. HOUSE REPORT, *supra* note 6, at 21.

118. *Persinger*, 729 F.2d at 842. *Accord Sedco*, 543 F. Supp. at 567 (stating that the tort in the whole must occur in the United States).

119. 735 F.2d at 1520-25.

## V. ANALYSIS OF CASE

Judge Scalia found it useful to review the manner in which the appellants' claims originated to illustrate that they were not of the character involving property interests or possessions to which the "immovable property" exception attached.<sup>120</sup> The court noted that the principle of a sovereign possessing the absolute power to assert the private claims of its nationals against another was well established under international law.<sup>121</sup> The sovereign was not required to obtain the consent of the national (i.e., claimholder)<sup>122</sup> and the fact that this claim had been put forward afforded a complete defense for the defendant sovereign in any suit brought by the private national.<sup>123</sup> Once the sovereign had stated the claim, that sovereign had wide-ranging discretion in disposing of that claim.<sup>124</sup> Final settlement between the sovereigns wiped out the underlying private debt,<sup>125</sup> releasing the defendant sovereign from all obligations including the possible<sup>126</sup> legal obligation of Mexico to its nationals, under Mexican law, and Mexico's legal obligation that arose from the wrongful taking<sup>127</sup> and settled by the 1941 Treaty.<sup>128</sup> The crucial distinction made by the court was that the legal obligation settled by the 1941 Treaty was "owed by a different sovereign"<sup>129</sup> and derived from the application of different law to entirely dissimilar and distinct facts."<sup>130</sup>

It is against this background that the court stated, "the compensation rights asserted here are not remotely 'rights in immovable property.'"<sup>131</sup> Although the phrase has been afforded an expansive scope elsewhere,<sup>132</sup> the court did not accept the appellants' expansive reading

120. *Id.* at 1522.

121. *Id.* at 1523. See RESTATEMENT, *supra* note 102, at § 212 (the United States has discretion as to whether to espouse a national's claim for injury by conduct attributable to a foreign state that is wrongful under international law. See also HENKIN, *supra* note 68, at 262-63.

122. 735 F.2d at 1523. See RESTATEMENT, *supra* note 102, at § 213.

123. 735 F.2d at 1523. See RESTATEMENT, *supra* note 102, at § 205 (settlement by a state of which an injured alien is a national . . . is effectively a defense to an international claim asserted by the state against that state responsible for the injury).

124. *Id.* (a sovereign may compromise the claim, seek to enforce it or waive it entirely). See also *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (President Carter espoused the claims of United States nationals against Iran).

125. HENKIN, *supra* note 68, at 262.

126. 735 F.2d at 1523.

127. *Id.* (wrongful under either the United States or Texas law or the 1941 Treaty).

128. *Id.* See 1941 Treaty, *supra* note 32.

129. *Id.* (the obligation was assumed by Mexico).

130. *Id.*

131. *Id.*

132. See, e.g., LA. CIV. CODE ANN., art. 535 (West 1980)(at civil law the phrase in-

of the phrase included in the FSIA exception.<sup>133</sup> Rather, the court viewed its responsibility as one of determining what Congress meant by the language in the particular statute at bar.<sup>134</sup> The court, after its reading of the legislative history which clarified the FSIA purposes,<sup>135</sup> decided that a narrower construction of the term was intended.<sup>136</sup>

Because the compensation claims asserted by appellants' were not property interests in real estate,<sup>137</sup> nor possessory rights, nor rights to payment of money secured by an interest in land, the claims were not "rights in immovable property" within the meaning of section 1605(a)(4).<sup>138</sup> As the court noted, neither the title to, nor the use of, the Texas lands can possibly be affected by the outcome of appellants' action.<sup>139</sup> Any questions of title, possession and even compensation as between the United States and appellants' predecessors in interest were extinguished after the 1941 Treaty.<sup>140</sup>

The court also rejected the appellants' reliance on the Supreme Court case *Comegys v. Vasse*.<sup>141</sup> The appellants relied on that case for the proposition that "payment [of a claim] under a claims settlement treaty . . . [is properly viewed as] an indemnification for the violation of a preexisting property right."<sup>142</sup> Although conceding that this was true, the appellate court stated that the issue, whether the right to indemnification was in the nature of a real property right for FSIA purposes,<sup>143</sup> was not resolved. In *Comegys*, the United States was in the same position as Mexico in the instant case.<sup>144</sup> The United States had raised claims against Spain and settled them creating an obligation to indemnify the original claimholder.<sup>145</sup> Before the United States

cludes leases, licenses, rents, mineral rights, easements and royalties). See also THOMPSON, *supra* note 98, § 19 at 83. Thompson notes that in the law of eminent domain the compensation awarded for the compulsory conversion of real estate "will be treated as real estate until the owner, being *sui juris*, accepts it as personal property." *Id.*

133. 735 F.2d at 1521.

134. *Id.*

135. See *supra* notes 84-120 and accompanying text.

136. 735 F.2d at 1521.

137. The court gives examples of property interests, i.e., a leasehold, easement or servitude. *Id.* at 1523.

138. *Id.*

139. *Id.* The Court also notes that, although appellant's predecessors in interest possessed a claim to title and possession and a right in immovable property, these were extinguished by the 1941 Treaty. *Id.*

140. *Id.*

141. 26 U.S. (1 Pet.) 193 (1828).

142. 735 F.2d at 1523 (citing Appellants' Brief at 15).

143. *Id.*

144. *Comegys*, 26 U.S. (1 Pet.) at 193.

145. *Id.* at 212.

brought the action, the defendant, a claimholder, made an assignment in bankruptcy.<sup>146</sup> The issue was whether indemnification should be paid to the original claimholder or to the assignee.<sup>147</sup> The Supreme Court held that the indemnification was not a "donation or gratuity,"<sup>148</sup> but rather sufficiently attributable to the claim against Spain that indemnification should go to the assignee, the new claimholder.<sup>149</sup>

The D.C. Circuit stated that this second claim for indemnification was not identical to the first claim received through the assignment, either in amount or in its general character as a real estate claim.<sup>150</sup> As such, the character of the claim was not a "right in immovable property" for the purpose of the FSIA.<sup>151</sup> In sum, the court held that because appellants' claims would not affect property interests in, or rights to possession of, land located in the United States, the compensation claims were not "rights in immovable property," within the meaning of section 1605(a)(4).<sup>152</sup>

The D.C. Circuit also found the "tortious act" exception<sup>153</sup> inapplicable to assert jurisdiction over Mexico. As stated previously,<sup>154</sup> appellants argued that Mexico's failure to compensate them for its use and taking of their land claims was a violation of international, domestic and presumably Mexican law and thus <sup>155</sup> tortious within the scope of section 1605(a)(5).<sup>156</sup>

The court determined that the conduct complained of lacked the required nexus with the United States,<sup>157</sup> namely, that the tortious act occurred within the jurisdiction of the United States.<sup>158</sup> The thrust of appellants' tort claim was the failure to compensate, an omission which can only be deemed to have occurred in Mexico.<sup>159</sup> The court stated that even if the failure to compensate had the effect of retroactively rendering the prior acts on United States soil tortious, the entire tort

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146. *Id.* at 193.

147. *Id.* at 194.

148. *Id.* at 217.

149. *Id.* at 219.

150. 735 F.2d at 1524.

151. *Id.* (The Court also noted that *Comegys* differed from the instant case in that the claim had been adjudicated and found meritorious *before* it was espoused). [Emphasis added].

152. *Id.*

153. 28 U.S.C. § 1605(a)(5).

154. *See supra* note 67.

155. The tort would be conversion. 735 F.2d at 1521.

156. 735 F.2d at 1524.

157. *Id.*

158. *See infra* text and accompanying notes 117-19.

159. 735 F.2d at 1525.

would not have occurred here.<sup>160</sup>

Again, as it did with the "immovable property" exception, the court predominantly relied upon the primary purpose of the "tortious act" exception.<sup>161</sup> It determined that Congress did not intend to create a broad exception encompassing all alleged torts that bear some relationship to the United States.<sup>162</sup> Therefore, because jurisdiction was lacking under the FSIA, the Court of Appeals affirmed the decision of the district court.<sup>163</sup>

There was one concurring opinion reported by Judge Edwards, who read the court's holding as limited by and responsive to the precise and unique facts of the case.<sup>164</sup> Judge Edwards made this clear by stating:

The opinion did not hold that in a contemporary setting, the United States can *lawfully* expropriate property legitimately owned by aliens in this country, consummate a treaty with a foreign sovereign extinguishing the alien's property rights without compensation or consideration, and then avoid responsibility under the Constitution or other applicable laws of this nation.<sup>165</sup>

## VI. CONCLUSION

The court's decision appears to correctly reflect the policies underlying the FSIA.<sup>166</sup> Although on the facts of this case it would seem equitable to allow the appellants' action to continue, the FSIA exceptions were intended to encompass very distinct situations.<sup>167</sup> To permit courts to interpret these exceptions to their broadest parameters would result in immunity for foreign sovereigns becoming the exception instead of the rule. Thus, future parties seeking to subject a foreign sovereign to a suit in the United States should expect the courts, in the

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160. See *Sedco*, 543 F. Supp. 561.

161. See *infra* text and accompanying notes 115-16.

162. 735 F.2d at 1525.

163. *Id.* See 561 F. Supp. at 1190.

164. 735 F.2d at 1525 (Edwards, J., concurring).

165. *Id.*

166. See *supra* text and accompanying notes 88-94.

167. As the district court stated, "The Court is deeply troubled by the allegations in plaintiffs' complaint." 561 F. Supp. at 1200. The court continued, "For reasons unknown to the court, . . . Mexico has allegedly failed, as the 1941 treaty provides, to promptly evaluate the claims and provide compensation. Despite these serious concerns, the Court holds that it lacks subject matter jurisdiction over this case pursuant to the FSIA." *Id.* at 1201.



District of Columbia at least, to apply the FSIA exceptions only in the narrow manner intended by Congress.<sup>168</sup>

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168. See HOUSE REPORT, *supra* note 6, at 7-21.