# THE MEXICAN OIL SPILL: JURISDICTION, IMMUNITY, AND ACTS OF STATE

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The main questions that I will address are basically two: (1) does jurisdiction exist under international and U.S. law for entertaining or pressing claims against PEMEX or Mexico?, and (2) is there a possible exception to jurisdiction under the sister doctrines of sovereign immunity and act of state? The second question really hinges upon another which shall be utilized as the primary focus—does the commercial acts exception to the sister doctrines preclude any claim to sovereign immunity or act of state derogation from jurisdiction under the circumstances?

## I. JURISDICTION

Initially, it should be pointed out that if PEMEX and/or Mexico have violated international law and violations have had a direct effect upon the United States and/or its nationals, then there is hardly any question whether the United States can raise claims at the international level. It could; and the U.S. could seek redress through diplomatic negotiation, eventual arbitration or, perhaps, the International Court of Justice (although our so-called Connally Reservation to our acceptance of I.C.J. jurisdiction could play havoc with U.S. efforts before the Court. *See* Case of Certain Norwegian Loans (France v. Norway), [1957] I.C.J. 9.

I do not question the general statements made by Professor Handl concerning liability under international law. Indeed, I have even used his writings as part of an inquiry and analysis of foreign state obligations under international law to assure that the use of natural resources within its territory does not damage or cause injury to the properties, persons or natural conditions of the territory of a neighboring state. *See* J. PAUST & A. BLAUSTEIN, THE ARAB OIL WEAPON 141-45 (1977), and authorities cited. Similarly, I do not question the obvious fact that PEMEX activities have produced direct effects within the United States. Thus, I assume that it would not be improper or difficult legally for the United States to press claims at the international level.

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The more interesting question, for me, shifts to a consideration of domestic legal remedies. Do U.S. courts have jurisdiction under international and U.S. law to entertain claims against PEMEX and/or Mexico? The short answer in this case is yes. The United States, through its courts, has jurisdiction under two principles of international law: (1) the objective territorial principle, and (especially in combination with the first), (2) the protective principle. Mexico recognizes the "victim" theory or passive personality theory which would allow jurisdiction merely because there are U.S. victims, but as the U.S. does not recognize such a theory it would probably not be applicable in reverse (*i.e.*, against Mexico). This is so at least in U.S. courts, although some theory of estoppel may work against Mexico with regard to claims at the international level.

*Objective Territorial Jurisdiction*

Under the principle of objective territorial jurisdiction, it is possible to obtain jurisdiction over a foreign person, entity or state with regard to certain types of conduct engaged in abroad. The clearest case would be made where acts occurred partly outside and partly inside the United States. Three factors are often considered: (1) acts, (2) intent, and (3) effects within the United States. Even where all acts as such occur outside of the United States, it is possible to obtain objective territorial jurisdiction. It is not always necessary that all three of these factors occur in a given case.

One example of recognized jurisdictional competence when all of the defendant's acts (as such) occurred abroad involves use of an agency theory. Under the agency rationale, even if a defendant's acts occurred abroad, jurisdiction is possible where the defendant has knowingly used some agent to further some plan or consummate some activity within the United States and, thus, to produce effects within the United States. "The general rule of the law is, that what one does through another's agency is to be regarded as done by himself." *See, e.g.*, Ford v. United States, 273 U.S. 593, 620-24 (1926); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967), *cert. denied*, 389 U.S. 884 (1967). *See also* Strassheim v. Daily, 221 U.S. 280, 284-85 (1911); United States v. Winter, 509 F.2d 975 (5th Cir. 1975).

It does not matter, as far as jurisdiction over the defendant is concerned, whether the agent is a knowing or unknowing agent (or, according to other categorizations, a "conscious or unconscious agent" or "innocent agent"). *See, e.g.*, Ford v. United States, *supra* at 621, 623. What matters is that the defendant use the agent to further a plan or activity. Thus, a defendant standing outside the U.S. can be subject to

U.S. jurisdiction if the defendant knowingly uses the mail service (as an "innocent agent") to carry out a plan or activity within the United States. *See* Burton v. United States, 202 U.S. 344, 389 (1906), *citing* Horner v. United States, 143 U.S. 207, 214 (1892); *In re* Palliser, 136 U.S. 257, 266-68 (1890); Schoenbaum v. Firstbrook, 405 F.2d 200, 207 (2d Cir. 1968) ("use of the mails"). *See also id.* at 206, 208. [Other use of mails cases include: Salinger v. Loisel, 265 U.S. 224, 234 (1924); Benson v. Henkel, 198 U.S. 1, 15 (1904); Hartzell v. United States, 72 F.2d 569, 576 (8th Cir. 1934); Horwitz v. United States, 63 F.2d 706, 708-09 (5th Cir. 1933), *cert. denied*, 289 U.S. 760 (1933); United States v. Steinberg, 62 F.2d 77, 78 (2d Cir. 1932); United States v. Hecht, 7 F.2d 133-34 (S.D.N.Y. 1924); United States v. Eisler, 75 F. Supp. 634, 637 (D.D.C. 1947); United States v. Archer, 51 F. Supp. 708, 710-11 (S.D. Cal. 1943); *see also* United States v. Lombardo, 241 U.S. 73, 77 (1916); Reass v. United States, 99 F.2d 752, 754 (4th Cir. 1938). Foreign cases include: Mobarik Ali Ahmed v. The State of Bombay, 24 Int'l L. Rep. 156 (1961) (Supreme Court of India, 1957), *citing* MacLeod v. Attorney General of New South Wales ((1801) A.C. 455)]. The same should follow with regard to use of other "innocent agents" such as telephone services, wire services, and so forth. *See* Lamar v. United States, 240 U.S. 60, 65-66 (1916) (Holmes, J.), *citing* Burton v. United States, *supra*. *But see* East Europe Domestic International Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y. 1979) (finding no formal agency as such, but ignoring the unlitigated point about "innocent" agents). [With regard to use of wire services or electronic communication cases, see also Horwitz v. United States, *supra* at 709 (radio communications); McBoyle v. United States, 43 F.2d 273, 275 (10th Cir. 1930) (telegraphic communications)]. For use of "poisoned chocolates through the mails" and "stock fraud by mail" hypothetical examples, see N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 130 (1973).

A slightly different rationale also makes jurisdiction possible where the defendant acts outside and uses no agent within the United States. The second rationale is known as the continuing act theory and allows a recognition of jurisdiction where the defendant engages in an act or activity which, by fiction, "continues" into the territory of another country. Thus, where a person stands in Mexico and aims a rifle at a person standing in the United States, fires a shot, and the U.S. person is killed, the Mexican defendant (in a subsequent civil or criminal suit) cannot complain successfully that the U.S. does not have jurisdiction. *See* J. BRIERLY, THE LAW OF NATIONS 233 (5th ed. 1955); Burton v. United States, *supra* at 388; *In re* Palliser, *supra* at 265-66.

*See also* the Swiss case, involving a claim to enjoin a shooting establishment which endangered adjoining territory, *cited in* the Trail Smelter Case (United States v. Canada) (Arbitral Award of 1941), 3 R. Int'l Arb. Awards 1905, 1907 (1949). For a reverse shooting situation involving Mexican claimants and U.S. government actors, see United Mexican States (Garcia & Garza) v. United States (United States-Mexican Claims Comm.), 4 R. Int'l Arb. Awards 119 (1926), *reprinted in* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 283 (1968). Jurisdiction exists because there is an intent to produce an effect within the U.S., an actual effect within the U.S., and an "act" placed in motion abroad which "continues" into the U.S.—perhaps not in one sense, but the bullet continues into the U.S. and produces the impermissible effect. In theory this is similar to an "innocent agent" continuing into the U.S. to produce an effect.

An important recognition of the continuing act rationale occurred in Ford v. United States, *supra* at 623, where the Court quoted the former Assistant Secretary of State and Judge of the Permanent Court of International Justice John Bassett Moore:

> The principle that a man, who outside of a country willfully puts in motion a force to take effect in it, is answerable at the place where the evil is done is recognized in the criminal jurisprudence of all countries. . . . Its logical soundness and necessity received early recognition in the common law. Thus it was held that a man who erected a nuisance in one country which took effect in another was criminally liable in the country in which the injury was done. (quoting 2 MOORE'S INTERNATIONAL LAW DIGEST 244).

For similar recognitions of objective territorial jurisdiction over acts outside the U.S. which are intended to produce (intent) and do produce effects (effects) within the U.S., see United States v. Fernandez, 496 F.2d 1294, 1296 (5th Cir. 1974); United States v. Keller, 451 F. Supp. 631, 635 (D. Puerto Rico 1978). [Several other cases recognize jurisdiction in similar circumstances under an "effects" theory (*i.e.*, jurisdiction exists where the effects or "the evil" is felt), a "constructive presence" theory, and/or a continuing act theory. *See*, *e.g.*, United States v. Freeman, 239 U.S. 117, 120 (1915); Brown v. Elliot, 225 U.S. 392, 402 (1912); Hyde v. United States, 225 U.S. 347, 362 (1912); Reass v. United States, *supra*; Cochran v. Esola, 67 F.2d 743 (9th Cir. 1933); Hammond v. Sittel, 59 F.2d 683, 686 (9th Cir. 1932); Grayson v. United States, 272 F. 553, 557 (6th Cir. 1921), *cert. denied*, 247 U.S. 637 (1921); Moran v. United States, 264 F. 768, 770 (6th Cir. 1920); Franklin Mint Corp. v. Franklin Mint, Ltd., 360 F. Supp. 478, 482 (E.D. Pa. 1973);

Ramirez and Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594, 600 (S.D. Cal. 1956), *aff'd*, 245 F.2d 875 (9th Cir.), *cert. denied*, 355 U.S. 927 (1958); *see also* United States v. Thayer, 209 U.S. 39, 44 (1908). Cases also recognize jurisdiction when the intent element amounts merely to negligence and foreseeability concerning the effects felt within the United States. *See, e.g.*, Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231, 233-35 (9th Cir. 1969), and cases cited; *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18, Comment f at 50 (1965) ("conduct which was intended to produce the effect within the territory in the sense that those responsible for the conduct had reason to foresee that the effect . . . would result from the conduct outside"). Additional foreign cases are cited in the Restatement *supra* at 55-56].

Moore's statement, of course, is a significant recognition. If the U.S. has jurisdiction over a nuisance erected in Mexico, it should certainly have jurisdiction over a more substantial harm caused by oil pollution occurring in Mexico or Mexican waters and continuing into the United States. Again, under international law and the objective territorial principle, the U.S. certainly would have jurisdiction. *See* remarks of Professor Handl (published at 229 of this issue); PAUST & BLAUSTEIN, *supra*. As those who are familiar with international law can attest, this was certainly the basis for both U.S. jurisdiction to complain and Canadian responsibility in the famous *Trail Smelter Case* (United States v. Canada), *supra*. In *Trail Smelter*, the test proposed by Moore was implicitly recognized to a certain extent. The Tribunal, while referring to several works and quoting C. EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928), recognized that Canada owed a duty to protect the U.S. "against injurious acts by individuals from within its jurisdiction."

Thus, in *Trail Smelter* it was recognized that the U.S. could complain, and did successfully, about acts engaged in by Canadians within Canada that caused injury "in or to the territory" of the United States "or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence." *Trail Smelter*, *supra*. What actually was involved in *Trail Smelter* was a continuing act (*i.e.*, the activity that placed in motion pollutant particles, which traveled by air into the United States) and injurious effects that were of "serious consequence." It did not matter whether the particles were "willfully" put into motion where there was knowledge of pollution and the transnational effects of such were foreseeable. Thus, the three factors of act, intent and effects can be met where acts do not really occur as such in U.S. territory but the continuing act rationale

applies, a willful intent does not exist but foreseeability does, and effects (always necessary) actually occur. Certainly if the effects were intended the case is even stronger, since the factors of *intent* and *effects* can override even the need for either an agency or continuing act circumstance. *See, e.g.*, Ford v. United States, *supra*; Strassheim v. Daily, *supra*; Rivard v. United States, *supra*; United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1958), *cert. denied*, 392 U.S. 936 (1968); *In re* Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 313 (D.D.C. 1960); Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 288 (1952); United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (1951); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). *See also* United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); A.T. Cross Co. v. Sunil Trading Corp., 467 F. Supp. 47, 49 (S.D.N.Y. 1979); Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 557-58 (S.D.N.Y. 1972), *modified*, 484 F.2d 1355 (2d Cir. 1973); United States v. Keller, *supra*; United States v. Fernandez, *supra*; [and bracketed cases, *supra*, on the effects, constructive presence and continuing act theories].

In the present case it seems fair to conclude that Mexican oil pollutants set in motion in Mexico or Mexican waters can create liability where the pollution was either wilful or foreseeable and there are injurious effects within the United States. If the injurious effects of the *Trail Smelter* pollution were of "serious consequence," it also seems fair to conclude that the significant oil pollution in this case has been of "serious consequence." Whether or not the pollution was wilful, I assume that it was foreseeable when PEMEX chose to engage in, and Mexico allowed (just as Canada "allowed" in *Trail Smelter*), drilling activities in the Gulf of Mexico. Thus, jurisdiction under the objective territorial principle seems clear. Further, if we pierce the corporate veil of PEMEX, Mexican liability is clearer than even that of Canada in the *Trail Smelter* case.

*The Protective Principle of Jurisdiction*

Another basis for jurisdiction is the protective principle. Even though the acts occurred outside the United States, jurisdiction is possible under the protective principle if a significant national interest is at stake (and an exercise of jurisdiction is not otherwise impermissible under international law). *See, e.g.*, United States v. Keller, *supra*; Rivard v. United States, *supra*; United States v. Pizzarusso, *supra*; Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961); United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943).

Certainly in this case the national interest in protecting our waters,

beaches, fish, and other resources, industries, economy, and so forth is as significant if not more so than the national interests actually at stake in the above-cited cases (*e.g.*, concerning false statements made to American consulates in a foreign country). Moreover, there is a recognition in Article 7 of HARVARD RESEARCH IN INTERNATIONAL LAW (1932) that protective interests can include threats to security, territorial integrity, or political independence. *See also* United States v. Keller, *supra* (invasion of territory). In this case, it is not unfair to conclude that the pollution in question, which has been of such a great magnitude, has caused or poses a significant threat to U.S. territorial interests, including the relatively independent and free use of U.S. resources.

There is a danger in pushing the protective theory too far, however, and I suspect that the better view should be that actual effects should occur or be likely to occur before the protective principle should apply. *But see* United States v. Pizzarusso, *supra* at 11; United States v. Keller, *supra* at 635. The national interests at stake, when viewed in context, should also be of real significance; but these are matters best left to the courts for refinement. Nevertheless, it is worth noting that where both the objective territorial and protective principles point to jurisdiction the choice concerning application of the protective principle may be easier. An interesting "in between" case is Schoenbaum v. Firstbrook, *supra*. There, both protection from detrimental effects and use of the mails were mentioned, but jurisdiction seemed to rest on the effects doctrine alone. *See id.* at 206-08 (no specific jurisdictional principle was mentioned).

In this case one can conclude that jurisdiction does exist; but are there any exceptions to jurisdiction under the doctrines of sovereign immunity or act of state? Again, this question necessarily relates, under the circumstances, to analysis of the commercial acts exception to both of these doctrines and the propriety of a commercial acts exception in this case.

## II. THE "COMMERCIAL" OR "PRIVATE" ACT EXCEPTION TO THE SOVEREIGN IMMUNITY DOCTRINE

Under the 1976 Foreign Sovereign Immunities Act, which is patterned after international law, a foreign state or foreign state entity engaged in a "commercial" activity is not entitled to immunity from suit where, in the relevant language, the cause of action is based "upon an act outside the territory of the United States [carried on] in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States." *See* 28 U.S.C. § 1605(a)(2). On the "commercial" activity exception generally,

*see* Alfred Dunhill v. Cuba, 425 U.S. 682 (1976); City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. 1123, 1142 (1978) (Burger, C.J., concurring); Outboard Marine v. Pezetel, 461 F. Supp. 384 (D. Del. 1978); National Am. Corp. v. Nigeria, 448 F. Supp. 622, 639-42 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); Premier Steamship Corp. v. Embassy of Algeria, 336 F. Supp. 507 (S.D.N.Y. 1971); Pan American Tankers Corp. v. Vietnam, 296 F. Supp. 361, 363-64 (S.D.N.Y. 1969); Petrol Shipping v. Greece, 360 F.2d 103 (2nd Cir. 1966), *cert. denied*, 385 U.S. 931 (1966); Victory Transport v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1976). *See also* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929).

Since most seem to recognize that the act or activities in question *have* had a direct effect within the United States, I assume that the more interesting question is whether the act or activities in question are "in connection with a commercial activity" within the meaning of Section 1605. In other words, is PEMEX engaged in "commercial" activities or "sovereign" activities within the meaning of the 1976 Act? What essentially is the nature of PEMEX activity? With regard to any Mexican liability as a supervisor of the PEMEX enterprise, are relevant supervisory tasks or obligations essentially "commercial" or essentially "sovereign"? Alternatively, are Mexican acts engaged in "in connection with" a commercial activity?

*Does PEMEX Engage in "Commercial" Acts Within the Meaning of Section 1605(a)(2)?*

In the present case there can be no doubt concerning the essential nature of PEMEX activities. In a communication from the Government of Mexico to the U.S. State Department in an earlier case, the Government of Mexico recognized that: "Petroleos Mexicanos is 'an instrumentality of the Mexican Government'; is wholly owned and controlled by that Government; and that it has been incorporated and organized . . . for the purpose of operating and developing . . . oil properties in Mexico." *See* F.W. Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 14, 42 A.2d 57, 59 (Pa. 1945). Not only does the Mexican recognition constitute an admission of the status of PEMEX as an instrumentality that is wholly owned and controlled by the state, but the statement also constitutes an admission that the purpose of PEMEX and the nature of the activities that PEMEX engages in as a state entity are primarily "commercial" (*i.e.*, the operation and development of oil, the oil production business).

Although the court implicitly recognized that PEMEX was an oil

production or "commercial" enterprise carried on by the state, the court felt obligated to grant sovereign immunity at that time, in 1945, and, thus, before the 1952 Tate Letter which changed the U.S. position from an absolute theory to a restrictive theory of sovereign immunity. As the court stated: "It is irrelevant here that the foreign instrumentality conducts a commercial enterprise which, it was contemplated, would show a profit." *Id.* at 17. But today, after enactment of the 1976 Sovereign Immunities Act, the court's statement is still significant concerning a recognition made, that PEMEX "conducts a commercial enterprise which, it was contemplated, would show a profit." This is significant since the overall commercial nature of the enterprise was assumed as well as the profit-making purpose of the PEMEX enterprise, both of which are relevant concerning an appropriate interpretation of Section 1605(a)(2) of the Sovereign Immunities Act. Not only does the 1975 Section-by-Section Analysis of the 1976 Sovereign Immunities Act recognize that a "mineral extraction" or "mining" enterprise is a "commercial" enterprise within the meaning of Section 1605, but the analysis stresses that "if an activity is customarily carried on for a profit, its commercial nature could readily be assumed." *See* H.R.REP.NO. 94-1487 at 6615, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2891. In this instance, not only is it a widely recognized fact that the oil business, including production activities, is essentially a commercial enterprise engaged in for profit by both non-state and foreign state actors, but it is also clear that PEMEX itself, in this particular instance, similarly engages in a profit-oriented commercial enterprise.

Clearly PEMEX is engaged in the petroleum business, and clearly "the petroleum business" as such includes "primarily the production and sale of crude oil." *See* Carey and New England Petroleum Corp. v. Nat'l Oil Corp. & Libya, 453 F. Supp. 1097, 1099 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979). Thus, PEMEX activities must be deemed "commercial" for purposes of the 1976 Act.

It is also significant, moreover, that a famous international precedent exists which recognizes, in the face of serious foreign state claims to "sovereignty," that "mining" and "oil" concessions are to be treated the same; that neither mining nor oil concessions are "public" service concessions but both involve private, commercial activities; and that it is appropriate to ascertain guiding principles for dispute resolution "by resorting to the world-wide custom and practice in the oil business and industry . . ., the international oil business." *See* ARAMCO (Saudi Arabia v. the Arabian-American Oil Company), Arbitral Award of

Aug. 23, 1958, 27 I.L.R. 117 (1963), *reprinted in part* in STEINER & VAGTS, *supra* at 376.

Thus, the ARAMCO arbitration provides another example of a recognition of the fact that an oil production enterprise is essentially a private or commercial enterprise and, in that instance, one involving acts engaged in "to explore, prospect, drill for, extract, treat, manufacture, transport, deal with, carry away, and export petroleum . . . [and/or] to sell crude or refined products . . . ." *See id.*; *see also* N.V. Cabolent v. National Iranian Oil Co., decision of the Hague Court of Appeal, Netherlands (Nov. 28, 1968), *reprinted in* 9 INT'L LEGAL MAT. 152, 160 (1970) (agreement concerning exploration for and production of petroleum is private despite state control and interest in protection of resources located within its borders; adding, *id.* at 157-58, that under international law immune acts or activity can only be "pure acts of State"). Such a recognition, in a famous international arbitration, is clearly a relevant precedent for interpreting the 1976 Sovereign Immunities Act. The ARAMCO arbitration is also significant with regard to a proper interpretation of the import of the recognition contained in the 1975 Section-by-Section Analysis that a "mineral extraction" or "mining" enterprise is essentially a "commercial" enterprise within the meaning of the Act. Since ARAMCO recognized that mining and oil enterprises are equivalent sorts (*e.g.*, "An oil concession is a mining concession") and that neither are "public" in nature, it is fair to conclude that legal drafters of the 1975 Section-by-Section Analysis understood that oil and mining enterprises could each have been listed as examples of "commercial" enterprises, especially when one notes that the same sort of recognition was implicitly made in a U.S. case. *See* F.W. Stone Engineering Co. v. Petroleos Mexicanos, *supra*; and cases following.

Furthermore, it has long been a generally-shared expectation in the United States, at least, that "oil" is a "mineral" and that oil production activities are included within references to "mineral extraction" activities. *See generally*, 27 WORDS AND PHRASES 315-22 (1961) ("mineral"—"oil," citing numerous cases); BLACK'S LAW DICTIONARY 897 (5th ed. 1979) ("mineral lands"); *id.* at 1146 (4th ed. 1951) ("mineral right"); WEBSTER'S NEW COLLEGIATE DICTIONARY 732 (1976) ("mineral"); Northern Pacific Railway v. Soderberg, 188 U.S. 526, 534 (1902). Given the long and extensive case law equating the words "oil" and "mineral" or recognizing that the term "oil" is included within the term "mineral," it could not have been the intent of Congress to exclude oil extraction companies from the phrase "mineral extraction company." Thus, oil extraction companies and activities, even though

State-owned and/or controlled, must be included within the specifically listed "commercial enterprise" or "commercial activity" exceptions to immunity that are recognized in the legislative history of the 1976 Act. *See* H.R.REP.NO. 94-1487, *supra* at 6614-15.

Additionally, in this case we have a controlling recognition "that PEMEX is engaged in a commercial business, the operation in Mexico of an oil company for profit . . . and that the Mexican government . . . entered the oil business through PEMEX . . . ." D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1286 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d. Cir. 1977). *See also* S.T. Tringali Co. v. The Tug PEMEX XV, 274 F. Supp. 227, 230 (S.D. Tex. 1967) (PEMEX is "an independent corporation engaged in a private commercial activity").

If doubts about the "commercial" nature of PEMEX activities were at all possible at this point, it might also be useful to shift the focus toward another relevant test of whether acts engaged in by a state or state entity are entitled to protection under the sovereign immunity doctrine. As the 1976 Act states, "commercial character shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *See* 28 U.S.C. § 1603(d) (1976). As the 1975 Section-by-Section Analysis explains, "a public purpose is irrelevant. . . ." H.R. REP. NO. 94-1487, *supra* at 6615. There are really two interrelated concerns: were the acts in question "commercial in nature" or those "which private persons normally perform?" *See id.* at 6613. In either case, the acts in question are not "sovereign or governmental in nature" and are, thus, not protectable under the sovereign immunity doctrine. *See id. See also* Leigh & Sandler, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 VA. J. INT'L L. 685, 694 n. 28 (1976). What one recognizes, then, is an acceptance of the act theory as opposed to a purpose theory, especially in view of the phrase "those which private persons normally perform." *Id.* at 6613. *See also id.* at 6615 (acts "which might be made by a private person").

Under the acts theory, "an act must be deemed to be a private act where the State acts . . . in the same way as a private individual can act." *See* Collision with Foreign Government-Owned Motor Car, 40 I.L.R. 73 (1970) (Austrian Supreme Court 1961), *reprinted in* LEECH, OLIVER & SWEENEY, *supra* at 318-20. *See also* H.R. REP. NO. 94-1487, *supra* at 6613 ("acts which private persons normally perform"); *id.* at 6615; Harris & Co. v. Cuba, 127 So. 2d 687, 690, 692 (Fla. App. 1961); Edlow International v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827, 832 (D.D.C. 1977); Pan American Tankers Corp. v. Vietnam, *supra* at 363 (no immunity "with respect to private acts [*jure gestionis*]"); Petrol

Shipping Corp. v. Greece, *supra* at 110 (no immunity for "private acts"); LEIGH & SANDLER, *supra* at 696. With regard to the sister act of state doctrine and acts "that can also be exercised by private citizens," see Alfred Dunhill v. Cuba, *supra* at 704. Certainly in this case PEMEX acts like a private individual or entity "can act" and, indeed, operates an oil production enterprise in a way that private oil company enterprises do act. For this reason also, PEMEX engages in acts that are not *acta jure imperii* but "private" and unprotectable acts. It also involves no stretch of the imagination to conclude that supervision of a commercial enterprise is itself a "commercial" activity and, since supervision involves acts that private entities can and do engage in, a "private" activity. Thus, Mexico's acts or omissions as a state in supervising or failing to supervise the activities of PEMEX would, in this case, be "commercial" or "private" in nature. They are not governmental or sovereign acts but ordinary acts of supervision. It would also not matter that even "governmental" acts were involved in the process if the governmental acts were merely instrumental in furthering an activity or process that is essentially "commercial" or "private." *See, e.g.*, Alfred Dunhill v. Cuba, *supra* at 695 ("even if . . . enactment of a decree"); National Am. Corp. v. Nigeria, *supra* at 638-41; Pan American Tankers Corp. v. Vietnam, *supra* at 363-64. *See also* United States v. Sisal Sales Corp., *supra* at 273-74, 276 (even though "conspirators were aided by discriminating legislation"); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 606 (9th Cir. 1976) ("mere governmental approval or foreign governmental involvement" not a jurisdictional bar in antitrust suit). The primary concern is whether the overall or primary thrust of the activities in question is "commercial" or "private," not whether any particular governmental act is utilized in furtherance of such a process. *See* Pan American Tankers Corp. v. Vietnam, *supra* at 364, adding: "The *critical inquiry*, however, concerns the *basic character of the line of conduct* which generated the lawsuit" (emphasis added).

Further, the acts need only have been "in connection with" a commercial activity and need not be "commercial" in and of themselves. *See* 28 U.S.C. § 1605(a)(2). For this reason, "governmental" acts that further what is essentially a commercial process do not change "the basic character of the line of conduct" and are, one can conclude, acts (whether governmental or commercial *per se*) that are taken "in connection with" a commercial activity within the meaning of Section 1605 (a)(2). More specifically, Mexican acts of supervision (whether governmental or commercial *per se*) are acts taken "in connection with" a

commercial activity (of PEMEX) within the meaning of Section 1605 (a)(2).

## III. THE "COMMERCIAL" OR "PRIVATE" ACTS EXCEPTION TO THE SISTER ACT OF STATE DOCTRINE

Just as there is a "commercial" or "private" acts exception to the sovereign immunity doctrine, there is a similar exception to the sister act of state doctrine. *See* Alfred Dunhill v. Cuba, *supra* at 697-98, 701-06, especially *id.* at 706-11 (State Department letter reproduced in an appendix to the opinion); City of Lafayette v. Louisiana Power & Light Co., *supra*; National Am. Corp. v. Nigeria, *supra* at 639-41; Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) ("public acts"). Also of some interest is Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963) ("private" profit motive versus "sovereign" acts). *See also* Alfred Dunhill v. Cuba, *supra* at 706 ("for profit").

Thus, where, as here, the essential nature of the acts or activity in question is "commercial" or "private," no protection from jurisdiction exists by reason of the act of state doctrine. This is particularly so where the same claim is made by a foreign state alternatively with the claim to sovereign immunity. When one falls because the acts are essentially "commercial," or "private," both claims must fall. *See also* Alfred Dunhill v. Cuba, *supra*; Outboard Marine v. Pezetel, *supra* at 394-95, 397; National Am. Corp. v. Nigeria, *supra* at 639-41; H.R. REP. No. 94-1487, *supra* at 6619.

The same would hold true with regard to Mexico's liability as a supervisor of commercial activities, since such arises out of the commercial enterprise process. *See also* Alfred Dunhill v. Cuba, *supra* n. 11 at 697, 704 (acts that "can also be exercised by private citizens"). Moreover, the supervisory acts or omissions involved in this instance are acts that private entities can and do engage in or involve omissions that private entities might also make and, as private entities, be liable for under either a negligence or strict liability theory. Thus, under the private acts approach, Mexico could be found liable for negligent supervision (or liable under a strict liability theory) and would not be able successfully to argue that its acts or omissions were "public" and "sovereign" in view of the fact that relevant supervisory acts or omissions are not only essentially "commercial" in nature but also "private" (not public) given the fact that private entities can and do engage (or are liable for a failure to engage) in the same type of activities. *See also* Collision with Foreign Government-Owned Motor Car, *supra*; Ruma-

nia v. Trutta (Italian Supreme Court 1926), *reprinted in* 26 AM. J. INT'L L. Supp. 629 (1932); H.R. REP. NO. 94-1487, *supra* at 6613. Of further interest is Alfred Dunhill v. Cuba, *supra* at 704 (acts "that can also be exercised by private citizens").

Furthermore, with regard to liability under international law and international claims processes outside of U.S. courts, serious doubt exists whether the judicially developed act of state doctrine is a doctrine of international law. In fact, several U.S. cases declare that it is not. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, *supra* at 421-22; Jimenez v. Aristeguieta, *supra* at 557 n.6. See also 1 OPPENHEIM'S INTERNATIONAL LAW § 115aa (H. Lauterpacht, 8th ed. 1955). If so, neither PEMEX nor Mexico could seek to take advantage of any claim under the doctrine if claims were being handled through international processes (*e.g.*, diplomatic negotiation, arbitration, the International Court of Justice).

## IV. GENERAL CONCLUSIONS

For the various reasons noted above, it is my general conclusion that both the United States and U.S. courts have jurisdiction under relevant international and domestic laws to entertain or press claims against PEMEX and/or Mexico. It is also fairly clear that no exceptions to jurisdiction should exist under the circumstances. In this instance, the relevant acts or omissions are essentially commercial and private in nature. For this reason, it would not be possible for PEMEX or Mexico to obtain sovereign immunity or act of state derogations from jurisdiction.

It may also be interesting to note that the burden of proof with regard to claims of sovereign immunity or for application of the act of state doctrine is upon the state or state entity making such a claim. *See generally*, H.R. REP. NO. 94-1487, *supra* at 6616; Jet Line Services, Inc. v. M/V Marsa el Hariga, 462 F. Supp. 1165, 1171-72 (D. Md. 1978); Outboard Marine v. Pezetel, *supra* at 384, 397; National Am. Corp. v. Nigeria, *supra* at 639-40; Pan American Tankers Corp. v. Vietnam, *supra* at 363-64; Victory Transport v. Comisaria General, *supra* at 360; Harris & Co. v. Cuba, *supra* at 692-93. In the present case that burden would fall on PEMEX and/or Mexico and would not be overcome under the circumstances.

It should also be noted that although I have addressed the commercial acts exception to claims for sovereign immunity or act of state derogations from jurisdiction, and such is dispositive, other exceptions also exist. One arguably relevant exception, for example, would involve violations of international law by PEMEX and/or Mexico. *See*

*generally* the statement of Professor Handl, *supra*; PAUST & BLAUSTEIN, *supra*, and authorities and cases cited therein. If violations of international law exist, they pose exceptions to both of the sister doctrines. *See, e.g.*, Alfred Dunhill v. Cuba, *supra* at 707-11 (appendix, letter from U.S. Department of State Legal Adviser); Banco Nacional de Cuba v. Farr, Whitlock & Co., 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); Banco Nacional de Cuba v. Sabbatino, *supra* at 428, 420 n.34; Paust, Comment, 18 VA. J. INT'L L. 601 (1978). *See also* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 774-75 (1972) (Powell, J., concurring); Kalmich v. Bruno, 450 F. Supp. 227, 229 (N.D. Ill. 1978); 28 U.S.C. § 1605 (a)(3); and 22 U.S.C. § 2370. Of further interest is 28 U.S.C. § 1602 and H.R. REP. No. 94-1487, *supra* at 6613, 6616, 6618 (some uses of international law). Of a related import is The Paquete Habana, 175 U.S. 677, 700 (1900), and similar cases. On the general application of international law by U.S. courts, see also Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 INDIANA L.J. 621, 665-70 (1978); Paust, *Constitutional Prohibitions of Cruel, Inhumane or Unnecessary Death, Injury of Suffering During Law Enforcement Processes*, 2 HASTINGS CONST. L.Q. 873 (1975).