FOREIGN RELATIONS—JURISDICTION—JURISDICTIONAL BASIS FOR ACTIONS AGAINST FOREIGN GOVERNMENT-OWNED CORPORATIONS LIMITED TO FOREIGN SOVEREIGN IMMUNITIES ACT WHICH PRECLUDES JURY TRIAL WITHOUT VIOLATING SEVENTH AMENDMENT—*Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

When the Foreign Sovereign Immunities Act (FSIA)[1] was passed in 1976, it was heralded as a major step in the limitation of the sovereign immunity of foreign states.[2] Since that time, the FSIA has been the subject of extensive litigation.[3] One question that has repeatedly arisen is whether federal jurisdiction over suits involving foreign states is derived exclusively from the Act itself,[4] or is based on other federal statutes.[5] Courts finding jurisdiction solely in the FSIA must decide whether the statute allows a jury trial, and if not, whether this contravenes the seventh amendment jury requirement.[6] Examining these questions in the context of a personal injury action brought by a United States citizen against a foreign government-owned corporation, the United States Court of Appeals for the Third Circuit, in *Rex v. Cia. Pervana de Vapores, S.A.*,[7] concluded that the FSIA is the exclusive jurisdictional basis for a suit against a foreign state,[8] that it requires a non-jury trial,[9] and that it complies with the seventh amendment.[10]

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[1] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602–1611) (amending 28 U.S.C. §§ 1332, 1391, 1441 (1976)) [hereinafter cited as FSIA].

[2] *See* Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity* (pt. 1), 85 COM. L.J. 167, 167 (1980); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 33 (1978). *See generally* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211 (1979); Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1 (1976).

[3] *See* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 3 SW. L.J. 1009, 1010 (1979).

[4] 28 U.S.C. § 1330(a) (1976). For the text of this section, see note 17 *infra*.

[5] The two alternative jurisdictional sections are 28 U.S.C. §§ 1331-1332 (1976). *See* notes 18 & 19 *infra* for the texts of these statutes.

[6] *E.g.*, Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872 (2d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300); *see* Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity* (pt. 5), 85 COM. L. J. 497, 499-501 (1980). Note, Ruggiero v. Companie Pervana de Vapores *and* Rex v. Cia. Pervana de Vapores: *Jury Preclusion in Actions Against Foreign Sovereign-Owned Instrumentalities*, 20 COLUM. J. TRANSNAT'L. L. 199 (1981) [hereinafter cited as *Columbia Note*]; Note, *Foreign Sovereign Immunity and the Seventh Amendment: Recognizing the Right to Jury Trials in Suits Against Foreign States and State-Owned Corporations*, 21 VA. J. INT'L. L. 521 (1981).

[7] 660 F.2d 61, 62 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

[8] *Id.* at 65.

[9] *Id.*

[10] *Id.* at 69.

Calvin Rex, an American citizen,[11] worked as a longshoreman for the Northern Shipping Company.[12] On August 14, 1978, he was injured while unloading cargo from the M/V Chocano, a ship owned by Cia. Pervana de Vapores, S.A. (CPV).[13] CPV was a Peruvian corporation whose shares were entirely owned by the Peruvian government.[14]

Rex brought a personal injury action against CPV in district court under a federal act according longshoremen the right to sue for negligence,[15] and demanded a jury trial.[16] He asserted jurisdiction for this suit under 28 U.S.C. § 1330(a)[17] (actions against foreign states), 28 U.S.C. § 1331[18] (federal question), and 28 U.S.C. § 1332(a)(2)[19] (diversity of citizenship).[20] CPV argued that since it was

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[11] Brief for the United States of America at 4, Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981).

[12] Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459, 460 (E.D. Pa. 1980), *rev'd*, 660 F.2d 62 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300). The Northern Shipping Company is a stevedore, or "one who works at or is responsible for loading and unloading ships in port." WEBSTER'S NEW COLLEGIATE DICTIONARY 1141 (4th ed. 1976).

[13] Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459, 460 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300). The M/V Chocano is an ocean-going ship under Peruvian registry and is employed in foreign trade. *Id.* at 461.

[14] *Id.*

[15] *Id.* at 460. The act in question is the Longshoremen's and Harbor Workers' Compensation Act § 5(b), 33 U.S.C. § 905(b) (1976) [hereinafter cited as LHWCA].

[16] Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459, 460 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

[17] 28 U.S.C. § 1330(a) (1976). Section 1330(a) states:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id.

[18] 28 U.S.C. § 1331 (1976). Section 1331 provides in part: "The district courts shall have original jurisdiction of all civil actions . . . aris[ing] under the Constitution, laws, or treaties of the United States."

[19] 28 U.S.C. § 1332(a) (1976). Section 1332(a) declares:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
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> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
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> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id.

[20] Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459, 460-61 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

a foreign state as defined by the FSIA, jurisdiction rested exclusively in section 1330(a).[21] Because this section included the phrase "non-jury civil action,"[22] CPV moved to strike the jury trial request.[23]

The District Court for the Eastern District of Pennsylvania, in *Rex v. Cia. Pervana de Vapores, S.A.*,[24] rejected CPV's contention that section 1330(a) was the sole source of jurisdiction.[25] The court predicated its jurisdiction instead on sections 1331 and 1332(a)(2),[26] thereby avoiding an apparent conflict between the FSIA and the seventh amendment.[27] The district court reasoned that the effect of the Act was to remove the right to jury trial from section 1330(a), but not to affect the right implied in sections 1331 and 1332.[28] Accordingly, it granted Rex a jury trial under the latter provisions and denied CPV's motion.[29] Because of the difficult issue of constitutional law presented in this case,[30] the court certified an interlocutory appeal to the United States Court of Appeals for the Third Circuit.[31]

The court of appeals, in a divided decision,[32] held that all actions against foreign states under the FSIA are based exclusively on section 1330(a),[33] that these suits must be tried without a jury, and that this requirement does not violate the seventh amendment.[34] Accordingly, the *Rex* court reversed the district court's decision and remanded the case for additional proceedings.[35] Rex's petition for rehearing before the court *en banc* was denied,[36] as was his petition for a writ of certiorari from the Supreme Court of the United States.[37]

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[21] *Id.* at 461. *See* note 17 *supra* for the text of section 1330(a). Section 1330(a) refers directly to 28 U.S.C. § 1603(a) (1976), which defines "foreign state," and to 28 U.S.C. § 1605(a)(2) (1976), which presents the standard for deciding whether an activity is not immune. *See* notes 40 & 41 *infra* for the texts of 28 U.S.C. §§ 1603(a), 1605(a)(2) (1976).

[22] For the text of section 1330(a), see note 17 *supra*.

[23] Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459, 461 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

[24] 493 F. Supp. 459 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

[25] *Id.* at 469. *See* note 17 *supra* for the text of section 1330(a).

[26] 493 F. Supp. at 469. *See* notes 18 & 19 *supra* for the texts of sections 1331 and 1332(a).

[27] 493 F. Supp. at 466.

[28] *Id.* at 466-69.

[29] *Id.* at 469.

[30] *Id.* at 468-69. The district court observed that a timely determination of the question by the court of appeals would prevent either an infringement of constitutional rights or a misapplication of legal resources by the selection of a jury. *Id.* at 469.

[31] The appeal was certified under 28 U.S.C. § 1292(b) (1976). 493 F. Supp. at 469.

[32] Judges Aldisert and Weis formed the majority in this decision and Judge Sloviter dissented. 660 F.2d at 61.

[33] *Id.* at 65.

[34] *Id.* at 64.

[35] *Id.* at 69.

[36] *Id.* at 61.

[37] Rex v. Cia. Pervana de Vapores, S.A., 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

Judge Aldisert, writing for the majority, began his analysis by searching for an interpretation of the FSIA which would prevent a clash with the seventh amendment.[38] His quest focused on two preliminary inquiries: whether the federal district court had jurisdiction under section 1330(a), and whether the statute prohibited a jury trial.[39] In answering the first question, the court found that CPV was a foreign state under 28 U.S.C. § 1603(b)[40] and was not immune under 28 U.S.C. § 1605(a)(2),[41] thereby conferring section 1330(a) jurisdiction.[42] The court of appeals, in addressing the second question, examined the language of the statute and its legislative history.[43] Judge Aldisert decided that by the words "nonjury civil action," Congress intended to preclude the availability of a jury trial in civil suits brought under the FSIA.[44] The *Rex* court gleaned additional support for this view from 28 U.S.C. § 1441(d),[45] which autho-

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[38] 660 F.2d at 63. Judge Aldisert indicated that he was following the rule of judicial construction cited in Parsons v. Bedford, 28 U.S. 433, 448 (1830): "No court ought, unless the terms of an act [of Congress] rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *See also* Pernell v. Southall Realty, 416 U.S. 363, 365 (1974) (citing United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971)).

[39] 660 F.2d at 63. *See* note 17 *supra* for the text of section 1330(a).

[40] 28 U.S.C. § 1603 (1976). The relevant portion of § 1603 reads:

> For purposes of this chapter—
> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Id.

[41] 28 U.S.C. § 1605(a) (1976). The relevant portion of § 1605(a) proclaims: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ."

[42] 660 F.2d at 63-64.

[43] *Id.* at 64.

[44] *Id; see* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.66[4], at 700.179-.180 (2d ed. 1981). The majority found additional support for this decision in the legislative history of the Act: "As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. § 2402 (1976). Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved." H.R. REP. No. 1487, 94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6611-12 [hereinafter cited as HOUSE REPORT].

[45] 28 U.S.C. § 1441(d) (1976). Section 1441(d) states:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court

rizes removal of actions under the FSIA from state to federal court but asserts that "[u]pon removal the action shall be tried by the court without jury."[46] Thus, the majority concluded that the jurisdictional prerequisite had been met and that a jury trial was precluded under section 1330(a).[47]

The court of appeals next addressed the district court's significant holding that section 1330(a) was not the exclusive basis of jurisdiction in suits against foreign states.[48] Judge Aldisert determined that the legislative history would not support the district court's finding that CPV was both a "foreign state" under the FSIA[49] and a "citizen of a foreign state" under section 1332(a)(2),[50] and thus subject to jurisdiction under both statutes.[51] He interpreted the district court to have reasoned that Congress, by specifically amending section 1332 without amending section 1331, had authorized an alternative foundation of jurisdiction in actions against foreign states which included a jury trial right.[52] The majority found this explanation illogical, however, because it would permit a jury trial in federal question actions brought pursuant to section 1331, but not in diversity suits brought against foreign states under section 1332.[53]

In reaching its conclusion that section 1330(a) provided the sole jurisdictional foundation under the FSIA, the *Rex* court also analyzed

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> of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury.

Id.

[46] *Id.* The majority cited with approval, 660 F.2d at 63, the case of Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300), which involved section 1441(d) and which held that actions removed from state to federal court did not require a jury trial. *Id.* at 881. *See also* 1 J. MOORE, *supra* note 44, ¶ 0.66[4], at 700.180.

[47] 660 F.2d at 64.

[48] *Id.*

[49] *See* note 40 *supra* for the text of section 1603(b).

[50] *See* note 19 *supra* for the text of section 1332(a)(2). The district court noted, 493 F. Supp. at 467 n.8, several other decisions which held that section 1332 could be a basis for jurisdiction in this type of case, thus providing a right to jury trial: Houston v. Murmansk Shipping Co., 87 F.R.D. 71 (D. Md. 1980), *rev'd*, 667 F.2d 1151 (4th Cir. 1982); Lonon v. Companhia de Navegacao Lloyd Basilerio, 85 F.R.D. 71 (E.D. Pa. 1979); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979).

[51] 660 F.2d at 64. The legislative history provided: "Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." HOUSE REPORT, *supra* note 44, at 6613.

[52] 660 F.2d at 64. Since this suit was based on the LHWCA, a federal statute, the district court decided that it had federal question jurisdiction under section 1331. 493 F. Supp. at 467. In Trans Bay Eng'rs & Builders Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976), the Court of Appeals for the District of Columbia held that although a jurisdictional statute which was commonly used to avoid the sovereign immunity of the United States and to establish jurisdiction existed, other statutes such as sections 1331 and 1332 could also be employed. *Id.* at 376.

[53] 660 F.2d at 64.

two other circuit court opinions, *Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui,"*[54] and *Williams v. Shipping Corp. of India*,[55] in which the United States Courts of Appeals for the Second and Fourth Circuits affirmed district court denials of jury trial requests on facts comparable to those in this case.[56] Judge Friendly, in *Ruggiero*, scrutinized the applicable statutes and legislative history and held that section 1330 was the exclusive source of jurisdiction for suits against foreign sovereigns.[57] He explicitly rejected the district court's reasoning in *Rex*,[58] and determined that Congress designed section 1330(a) as a "single vehicle" for juryless trials in suits against foreign states.[59] The *Williams* court in turn applied the *Ruggiero* analysis to an action against a foreign state which was removed to federal court under section 1441(d),[60] and came to the same decision.[61] Consequently, Judge Aldisert found that the *Ruggiero* and *Williams* opinions reinforced the premise that section 1330(a) was the exclusive basis of jurisdiction against foreign states and that the Act's language precluded a jury trial.[62]

Because it decided that the unmistakable intent of Congress was to withhold a jury trial in suits against foreign states,[63] the court was forced to examine whether this denial resulted in a violation of Rex's seventh amendment rights.[64] The majority prefaced its discussion of this issue by noting that congressional acts are presumed to be constitutional,[65] especially when they pertain to foreign policy.[66]

The *Rex* court then traced the evolution of judicial interpretation of the seventh amendment.[67] The amendment declares: "In Suits at common law, where the value in controversy shall exceed twenty

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[54] 639 F.2d 872 (2d Cir. 1981).

[55] 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3838 (U.S. Apr. 19, 1982) (No. 81-1300).

[56] 660 F.2d at 62-63; *see Williams*, 653 F.2d at 876-77, 883; *Ruggiero*, 639 F.2d at 873, 881. Like Calvin Rex, the plaintiffs in these two cases were longshoremen who brought suit seeking damages for personal injuries alleged to have been sustained while working aboard ships owned by foreign government-controlled corporations. *See* 653 F.2d at 876; 639 F.2d at 873.

[57] 639 F.2d at 874-79.

[58] *Id.* at 876.

[59] *Id.*

[60] 653 F.2d at 881. *See* note 45 *supra* for text of section 1441(d).

[61] 653 F.2d at 883. In Jones v. Shipping Corp. of India, 491 F. Supp. 1260 (E.D. Va. 1980), the court applied the *Williams* analysis to a suit under section 1330(a) and came to a conclusion identical to that of the *Ruggiero* court. *Id.* at 1263.

[62] 660 F.2d at 63.

[63] *Id.* at 65.

[64] *Id.*

[65] *Id.* (citing Rostker v. Goldberg, 101 S. Ct. 2646, 2650 (1981)).

[66] *Id.*

[67] *Id.*

dollars, the right of trial by jury shall be preserved . . . ."[68] The United States Supreme Court initially interpreted this phrase in *Parsons v. Bedford*,[69] in which Justice Story stated that the seventh amendment applied to "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."[70]

CPV contended that the purpose of the seventh amendment was to protect the jury trial right existing when the amendment was enacted in 1791, and that its scope could therefore not be enlarged to include additional types of suits.[71] Under this approach, also adopted by the Second and Fourth circuits in *Ruggiero* and *Williams*,[72] the seventh amendment does not pertain to lawsuits against foreign states engaged in commercial dealings, since such actions did not exist in 1791.[73] Although the *Rex* majority agreed with the ultimate conclusion in *Ruggiero* and *Williams* that a right to jury trial is unavailable in this particular type of case,[74] it took exception to a characterization of the common law "as frozen in 1791,"[75] and rejected any attempt to limit application of the seventh amendment only to those actions specifically recognized by the common law at the time of its passage.[76]

In searching for the proper seventh amendment test, the court noted Rex's reliance on two United States Supreme Court cases, *Curtis v. Loether*[77] and *Pernell v. Southall Realty*.[78] The Supreme Court held in *Curtis* that "if [a] statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law," a jury trial is necessary.[79] In the same year the Court decided in *Pernell*

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[68] U.S. CONST. amend VII.

[69] 28 U.S. 433 (1830).

[70] *Id.* at 447.

[71] 493 F. Supp. at 465.

[72] *Ruggiero*, 639 F.2d at 881; *Williams*, 653 F.2d at 881; *see* Curtis v. Loether, 415 U.S. 189, 193-94 (1974); *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1078 (3d Cir. 1980). *See generally* Kirst, *Jury Trial and the Federal Torts Claims Act: Time to Recognize the Seventh Amendment Right*, 58 TEX. L. REV. 549 (1980); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

[73] 639 F.2d at 879; *see* Brandon, *Sovereign Immunity of Government Owned Corporations and Ships*, 39 CORNELL L.Q. 425 (1954).

[74] 660 F.2d at 63.

[75] *Id.* at 66.

[76] *Id.* (citing *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1078 (3d Cir. 1980)).

[77] 415 U.S. 189 (1974).

[78] 416 U.S. 363 (1974).

[79] 415 U.S. at 194; *see* Lorillard v. Pons, 434 U.S. 573, 584 (1978). *Curtis* involved the right to jury trial in a Title VIII violation action. 415 U.S. at 189-90.

that a jury trial was essential under the seventh amendment in suits nonexistent under common law, as long as they "involve[d] rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty."[80]

Rex contended that the seventh amendment required a jury trial in this case because damages are a legal, not equitable remedy.[81] The majority dismissed this argument and asserted that a demand for damages alone was not enough to turn this suit into one at common law under the seventh amendment.[82] The court supported this conclusion by analogy to actions for damages against the United States government, in which no right to a jury trial exists unless the statute creating the cause of action clearly provides for one.[83] Maintaining that it was focusing on the nature of relief requested, the court of appeals stated that the proper test was "whether [plaintiff's] action is in the nature of a legal remedy similar to a suit at common law."[84] The *Rex* court then explored prior case law regarding suits against foreign sovereigns and the statutory history of the FSIA in order to apply this formula.[85]

The court traced four major steps in the development of the area of private suits against foreign states.[86] First, in *The Schooner Exchange v. McFaddon*,[87] Chief Justice Marshall proclaimed the United

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[80] 416 U.S. at 375. *Pernell* concerned the right to recover the possession of property in the District of Columbia. *Id.* at 363.

It could be argued that the rights and remedies of the instant action are traditionally those enforced in admiralty, not in law. But, as the district court in this case pointed out, even though the LHWCA is based on the admiralty jurisdiction in Article III of the Constitution, the substantive foundation of a suit under section 905(b) is "a traditional tort action at law." 493 F. Supp. at 465 & n.3; *see* Hurst v. Triad Shipping Co., 554 F.2d 137 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977). For more background on the effect of the FSIA on admiralty practice, see generally Simmons, *Admiralty Practice Under the Foreign Sovereign Immunities Act—A Trap for the Unwary*, 12 J. MAR. L. 109 (1980).

[81] 660 F.2d at 66-67.

[82] *Id.* at 67. The court noted that Rex's reliance on the *Curtis-Pernell* test was misplaced, particularly in view of the fact that the federal statutes in those cases did not deal explicitly with the right to jury trial. *Id.* at 66.

[83] *Id.* at 67. *See* Lehman v. Nakshian, 101 S. Ct. 2698, 2702 n.9 (1981); Galloway v. United States, 319 U.S. 372, 388-89 (1943). The United States Supreme Court noted in *Lehman*: "Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action." 101 S. Ct. at 2702 n.9. *See generally* von Mehren, *supra* note 2, at 45-46.

[84] 660 F.2d at 67.

[85] *Id.* at 67-69.

[86] *Id.* at 67-68.

[87] 11 U.S. (7 Cranch) 116 (1812). This suit was brought by the American owners of a ship converted into an armed vessel by persons acting under the authority of the Emperor Napoleon. *Id.* at 117.

States' adherence to the absolute jurisdictional immunity doctrine for foreign sovereigns.[88] Second, this immunity, which was premised on the concepts of sovereign independent authority and international comity, was extended in *Berizzi Brothers Co. v. S.S. Pesaro*[89] to include commercial ships owned by foreign governments.[90] Third, an exception to the absolute sovereign immunity doctrine was developed in *Mexico v. Hoffman*,[91] where the Court avoided embarrassing the executive branch by denying a claim of immunity not recognized by the State Department.[92] Finally, in the "Tate letter,"[93] the State Department adopted the restrictive theory of sovereign immunity, which immunizes "sovereign or public acts (*jure imperii*) of a [foreign] state, but not . . . private acts (*jure gestionis*)."[94] The *Rex* court concluded that because suits against foreign sovereigns never existed at common law for reasons of governmental policy, "absolute judicial fealty to executive decisionmaking" was required.[95]

Turning to the legislative history, the majority noted that the FSIA is the exclusive statutory basis for actions against foreign states[96] and is intended to serve a twofold purpose: to codify the restrictive theory of sovereign immunity, and to require judicial determination of questions concerning the sovereign immunity of foreign states.[97] Judge Aldisert decided that the design of Congress was to subject foreign sovereigns to non-jury trials.[98] Because there is no right to a jury in civil law countries,[99] the *Rex* court inferred that foreign states might doubt its prudence and impartiality, and would consequently

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[88] *Id.* at 145-46. Chief Justice Marshall stated the doctrine as follows: "[N]ational ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." *Id.*

[89] 271 U.S. 562 (1926). This case concerned a breach of contract action brought against a merchant ship owned and operated by the Italian government. *Id.* at 569-70.

[90] *Id.* at 575.

[91] 324 U.S. 30 (1945).

[92] *Id.* at 35, 38. *Mexico v. Hoffman* involved an action in admiralty for negligence against a ship owned and operated by a private Mexican corporation. *Id.* at 31-33. Because the State Department policy at the time was to recognize only sovereign immunity of ships in "possession and public service of the foreign government," *id.* at 32, the Mexican government's claim of immunity from suit was denied by the Supreme Court. *Id.* at 38.

[93] Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General, 26 DEP'T ST. BULL. 984 (1952), *reprinted in* Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976) (appendix to opinion).

[94] *Id.* at 984.

[95] 660 F.2d at 68.

[96] *Id.*; HOUSE REPORT, *supra* note 44, at 6604.

[97] 660 F.2d at 68; HOUSE REPORT, *supra* note 44, at 6604-06.

[98] 660 F.2d at 68-69.

[99] *Id.*; *see Ruggiero*, 639 F.2d at 878, 880 n.12.

be more likely to cooperate in a trial without a jury.[100] The court found additional support in the fact that Congress applied the special procedures used in suits against the United States, which is not subject to jury trial,[101] to foreign sovereigns in the FSIA.[102]

The *Rex* court maintained that limitation of the right to jury trial was at the center of the congressional decision to allow jurisdiction over foreign states in federal courts.[103] Inasmuch as Congress has the power to restrict the jurisdiction of federal courts,[104] Judge Aldisert reasoned that prohibiting the legislative branch from limiting the lesser right to jury trial could induce it to remove these cases from federal jurisdiction entirely, thereby returning to absolute immunity for acts of foreign states and leaving plaintiffs with no recourse whatever.[105]

Because the FSIA failed to "[create] a cause of action in the nature of a common law remedy" or to "codify a pre-existing cause of action at common law," the majority decided that the congressional prohibition of the right to jury trial in a suit under the Act did not violate the seventh amendment.[106] Therefore, the court held that since an action against a foreign sovereign in district court under the FSIA is not a suit at common law within the seventh amendment, there is no right to jury trial in this case.[107]

Judge Sloviter, in her dissent, agreed with the majority's analysis of the non-constitutional issues.[108] She conceded that the FSIA is the exclusive basis of jurisdiction in actions against foreign states as defined by the statute and that the constitutional issue must therefore be confronted,[109] but disagreed with the formulation and application of the majority's seventh amendment test.[110] She contended that the majority incorrectly concentrated on the type of defendant, rather than the character of the plaintiff's suit.[111] In her view, this focus

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[100] 660 F.2d at 69.

[101] *Id.* (citing 28 U.S.C. § 2402 (1976)). This denial of a jury trial was upheld in Lehman v. Nakshian, 101 S. Ct. 2698, 2700-01 (1981).

[102] 660 F.2d at 69. (citing 28 U.S.C. § 1608(d)-(e) (1976)); *see* HOUSE REPORT, *supra* note 44, at 6624-25.

[103] 660 F.2d at 69.

[104] *Ex parte* McCardle, 74 U.S. 506, 513 (1868).

[105] 660 F.2d at 69. While the court cryptically concluded that requiring a jury trial would "ultimately work to the detriment of injured plaintiffs," the clear implication would be a return to absolute immunity from suit for foreign states. *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* (Sloviter, J., dissenting).

[109] *Id.* at 69-70 (Sloviter, J., dissenting).

[110] *Id.* at 70 (Sloviter, J., dissenting).

[111] *Id.* Although the dissent agreed with the majority that one of the major congressional purposes reflected in the FSIA was to place all sovereign immunity questions in the hands of the

permits Congress to unconstitutionally deprive the plaintiff of a jury trial by broadly defining "foreign state" in the FSIA to include a corporation whose stock is owned by a foreign government.[112]

The dissent first examined the breadth of the seventh amendment as reflected in the definition of "common law," and the analogy between the sovereign immunity of the United States and that of a foreign government.[113] Judge Sloviter concurred with the majority's assertion that the amendment's scope was not limited to common law forms of action that existed in 1791,[114] but differed with its formulation of the proper test.[115] She maintained that the relevant standard was that stated in *Pernell*: "whether the 'rights and remedies' at issue [were] 'of the sort' enforced at common law."[116] Applying this formula, she concluded that the tort damages sought in this suit were a customary common law remedy, and thus the right to jury trial accrued to the plaintiff.[117] The *Rex* dissent criticized the majority for switching without explanation from a test focusing on the type of relief requested to one concerned with the common law ability to sue a foreign state.[118]

Judge Sloviter asserted that the majority's concentration on the character of the defendant had induced it to liken the sovereign immunity of the United States government with that of foreign states.[119] Because of the different theoretical underpinnings of these two types of immunity, she found this comparison mistaken.[120] The

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judiciary, *id.* at 75 (Sloviter, J., dissenting), it parted company with the majority on the effect of the congressional adoption of a restrictive theory of foreign sovereign immunity. *Id.* at 76 (Sloviter, J., dissenting). Where Judge Aldisert found an intent to protect foreign sovereigns from increased liability by prohibiting a jury trial in actions against them, *id.* at 69, Judge Sloviter discovered a plan to afford American citizens greater protection by permitting them to sue foreign sovereigns for damages incurred within the context of commercial activities. *Id.* 76 (Sloviter, J., dissenting).

[112] *Id.* at 76 (Sloviter, J., dissenting). For the definition of "foreign state," see text of section 1603, *supra* note 40. The dichotomy between a foreign state's public acts and corporate activities was critical to the dissent, in contrast to the majority which did not even deal with it. *See* notes 127-34 *infra* and accompanying text.

[113] 660 F.2d at 70-72 (Sloviter, J., dissenting).

[114] *Id.* at 70 (Sloviter, J., dissenting). She noted that there was a great deal of precedential support for this view. *Id.*

[115] *Id. See* note 84 *supra* and accompanying text for a statement of the majority's test.

[116] 660 F.2d at 70 (Sloviter, J., dissenting) (citing Pernell v. Southall Realty, 416 U.S. at 375). For the majority's discussion of the test, see notes 77-84 *supra* and accompanying text.

[117] 660 F.2d at 70 (Sloviter, J., dissenting). Judge Sloviter's conclusion was based on the fact that the plaintiff, a United States citizen, sued in tort for personal injuries resulting from his work as a longshoreman unloading cargo from a ship owned by the defendant. *Id.*

[118] *Id.*

[119] *Id.* at 71 (Sloviter, J., dissenting); *see* note 83 *supra* and accompanying text.

[120] 660 F.2d at 71-72 (Sloviter, J., dissenting).

dissent noted that, on the one hand, the United States' sovereign immunity, under which the government cannot be sued without its consent[121] and can limit that consent by not allowing a jury trial,[122] is premised on a variety of theories.[123] On the other hand, the sovereign immunity of a foreign state is based on "comity and expediency in the conduct of foreign affairs."[124] Consequently, a foreign sovereign can be sued without its consent under the normal laws of the host state.[125] Accordingly, Judge Sloviter decided that this analogy should not be used to allow the denial of a right to jury trial in a suit against a foreign state.[126]

The second section of the dissent explored the traditional differentiation between a foreign government and its corporate interests,[127] and the historical distinction between the United States government and commercial corporations owned by it.[128] Judge Sloviter reasoned that although corporations wholly owned by foreign sovereigns did not exist in 1791,[129] when they later began to appear they were not given presumptive immunity from suit.[130] Corporate immunity, when acknowledged, was not based solely on the status of a corporation as a wholly owned governmental entity or recognized agent,[131] but rather on "the nature of the foreign sovereign's action or activity

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[121] *Id.* at 71 (Sloviter, J., dissenting) (citing 28 U.S.C. § 2402 (1976)). Judge Sloviter decided that the congressional appropriations clause, U.S. CONST. art. I, § 9, cl.7, "which conditions the United States' liability on its own consent, puts the sovereign immunity of the United States on a far different basis than either the sovereign immunity of the constituent states or of a foreign state." 660 F.2d at 71 n.1 (Sloviter, J., dissenting).

[122] 660 F.2d at 71 (Sloviter, J., dissenting); *see* Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962); United States v. Sherwood, 312 U.S. 584, 587 (1941).

[123] 660 F.2d at 71 (Sloviter, J., dissenting). Judge Sloviter noted that United States' sovereign immunity "has been attributed to a variety of constitutional, historical, and metaphysical principles." *Id.*

[124] *Id.*; *see* First Nat'l Bank v. Banco Nacional City de Cuba, 406 U.S. 759, 762 (1972).

[125] 660 F.2d at 71 (Sloviter, J., dissenting) (citing The Santissima Trinidad & The St. Andre, 20 U.S. 283, 352-53 (1822)).

[126] 660 F.2d at 72 (Sloviter, J., dissenting).

[127] *Id.* at 72-73 (Sloviter, J., dissenting).

[128] *Id.* at 73 (Sloviter, J., dissenting).

[129] *Id.* at 72 (Sloviter, J., dissenting); *see* Mexico v. Hoffman, 324 U.S. 30, 40-41 (1945) (Frankfurter, J., concurring); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 573 (1926).

[130] 660 F.2d at 72 (Sloviter, J., dissenting). Only one pre-FSIA case held that a foreign government-owned corporation was entitled to sovereign immunity in United States courts. *See* Oliver American Trading Co. v. Mexico, 5 F.2d 659 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925).

[131] 660 F.2d at 72 (Sloviter, J., dissenting) (citing United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202 (S.D.N.Y. 1929)). The dissent noted that another test used was "[w]hether the corporate entity . . . is of such a character as to be recognized as a unit of the . . . Government. " *Id.* at 72-73 (Sloviter, J., dissenting) (quoting *In re* Investigation of World Arrangements, 13 F.R.D. 280, 290 (D.D.C. 1952)).

at issue."[132] Immunity was generally granted for official activities of a foreign state and withheld for commercial activities.[133] Thus, the dissent asserted that at common law foreign corporations like CPV could be sued, and that the majority's application of the sovereign immunity of the foreign state itself was misplaced.[134]

Judge Sloviter also contrasted actions involving the United States government with those against commercial corporations owned by the United States.[135] The general rule is that sovereign immunity is not given automatically to a corporation simply because the government owns it.[136] Since lawsuits involving corporations controlled by the United States government are brought in district court instead of the court of claims,[137] the plaintiff is usually awarded a jury trial even though the owner of the defendant corporation is a sovereign state.[138] Hence, the dissent concluded that any automatic identification of a foreign sovereign with commercial corporations under its control was unwarranted.[139]

The final section of Judge Sloviter's opinion focused on the majority's contentions that acts of Congress are presumed to be constitutional,[140] and that the congressional foreign policy judgment echoed in the FSIA must be afforded great weight.[141] The dissent agreed with the majority's view that the courts should defer to Congress when it enacts foreign affairs legislation,[142] but disagreed with its justification of the denial of substantive constitutional rights through the congressional power to control the jurisdiction of the federal courts.[143] There-

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[132] *Id.* at 74 (Sloviter, J., dissenting); *see* Victory Transp. Inc. v. Comisaria General, 336 F.2d 354, 360-61 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

[133] 660 F.2d at 74 (Sloviter, J., dissenting).

[134] *Id.* at 73 (Sloviter, J., dissenting).

[135] *Id.*

[136] *Id.*; *see, e.g.*, United States v. Strang, 254 U.S. 491, 493 (1921); Bank of the United States v. Planters' Bank, 22 U.S. 904, 906 (1824).

[137] 660 F.2d at 74 n.6 (Sloviter, J., dissenting) (citing Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549 (1922)).

[138] *Id.* at 74 (Sloviter, J., dissenting) (citing Legette v. National R.R. Passenger Corp., 478 F. Supp. 1069 (E.D. Pa. 1979); Washington v. National R.R. Passenger Corp., 477 F. Supp. 1134 (D.D.C. 1979)).

[139] *Id.* at 73 (Sloviter, J., dissenting).

[140] *Id.* at 75 (Sloviter, J., dissenting).

[141] *Id.* at 75-76 (Sloviter, J., dissenting).

[142] *Id.* at 75 (Sloviter, J., dissenting). *See* note 66 *supra* and accompanying text. Judge Sloviter implied that the majority would defer to congressional foreign affairs legislation only when passed on the advice of the executive, while Judge Aldisert actually indicated that the judiciary should treat both branches similarly. 660 F.2d at 75. However, both judges probably intended the same standard to apply.

[143] 660 F.2d at 75; *see* United States v. Klein, 80 U.S. 128 (1872); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948); notes 104 & 105 *supra* and accompanying text.

fore, Judge Sloviter cautioned that whenever Congress exceeds the scope of its powers, the judiciary must not be afraid to intervene to prevent injustice.[144]

The dissent discovered two major congressional purposes reflected in the FSIA: the judiciary should determine all sovereign immunity questions, and United States citizens should be able to bring suits against foreign states conducting commercial activities.[145] Judge Sloviter contended that the FSIA exceeded these objectives by broadly defining "foreign state" to include foreign state-owned corporations pursuing commercial activities.[146] Thus, in tort and contract actions against a large number of these corporations, the plaintiff is deprived of a jury trial.[147] Since these suits "involve 'rights and remedies of the sort traditionally enforced in an action at law' " under the *Pernell* test,[148] the dissent decided that the seventh amendment should apply and a right to jury trial should be guaranteed.[149] In conclusion, Judge Sloviter would have held that the non-jury trial provision in the FSIA as applied to damage actions against foreign sovereign-owned corporations was unconstitutional because it contravened the seventh amendment.[150]

In the *Rex* case, both the majority and dissent agreed that section 1330(a) of the FSIA was the sole basis of jurisdiction for suits against foreign states,[151] but parted company on the formulation and application of the law of the seventh amendment.[152] The exclusivity of section 1330(a) is not as clear as the *Rex* opinions suggest, however, when the text of the statute and legislative history are considered. Following an examination of the minority and majority approaches to this problem,[153] an unusual procedure for adjudication will be suggested.[154]

Recent federal court decisions construing the question of jurisdiction in actions brought under the FSIA by American citizens against

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[144] 660 F.2d at 75 (Sloviter, J., dissenting).

[145] *Id.* at 75-76 (Sloviter, J., dissenting); *see* HOUSE REPORT, *supra* note 44, at 6610; note 97 *supra* and accompanying text.

[146] 660 F.2d at 76 (Sloviter, J., dissenting).

[147] *Id.*

[148] *Id.* (citing Pernell v. Southall Realty, 416 U.S. at 375).

[149] *Id.* at 76 (Sloviter, J., dissenting).

[150] *Id.*

[151] *Id.* at 69 (Sloviter, J., dissenting).

[152] *Id.* at 70 (Sloviter, J., dissenting).

[153] *See* notes 155-92 *infra* and accompanying text. This Note will refer to the prevailing interpretation of this provision of the FSIA, represented largely by the decisions of the circuit courts, as the "majority" view; while the term "minority" will be used to refer to the position taken in several federal district court decisions, some of which have been reversed.

[154] *See* notes 193-211 *infra* and accompanying text.

foreign government-owned corporations fall into two groups. The majority view, of which *Rex* is a recent example, holds that section 1330(a) is the sole basis of a district court's jurisdiction under the Act.[155] The minority view, typified by *Icenogle v. Olympic Airways, S.A.*,[156] concludes that jurisdiction may be based on sections 1332(a)(2) (diversity of citizenship) or 1331 (federal question), in addition to section 1330(a) (actions against foreign states).[157] Both viewpoints discuss the language of the statute itself and the legislative history.

Analyzing the statute, the majority of courts claim that by using the words "nonjury civil action" in section 1330(a), Congress repudiated the right to trial by jury in civil suits.[158] Moreover, since section 1441(d) sanctions removal of actions under the FSIA from state to federal court and expressly prohibits a jury trial,[159] these courts reason that sections 1441(d) and 1330(a) must be read together[160] and thus, section 1330(a) must also preclude a jury trial.[161]

The minority of courts contend that because the phrase "nonjury civil action" is not used anywhere else in the FSIA,[162] its scope is limited to section 1330(a), and hence it does not affect the right to a jury trial in a case brought under the other jurisdictional provisions.[163] Further, these courts note that the specific jury trial prohibition in section 1441(d) does not extend to a suit originating in federal court under section 1332(a)(2) because the text of the statute contains no similar ban.[164]

Both the majority and minority of courts also dispute the meaning of the legislative history. According to the congressional report, the purpose of section 1330(a) was to "[provide] a comprehensive jurisdictional scheme in cases involving foreign states."[165] The major-

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[155] *E.g.*, Houston v. Murmansk Shipping Co., 667 F.2d 1151, 1153 (4th Cir. 1982); *Ruggiero*, 639 F.2d at 878; *Williams*, 653 F.2d at 881.

[156] 82 F.R.D. 36, 37 (D.D.C. 1979); *see* 20 HARV. J. INT'L L. 720 (1979).

[157] *E.g.*, Houston v. Murmansk Shipping Co., 87 F.R.D. 71, 75 (D. Md. 1980), *rev'd*, 667 F.2d 1151 (4th Cir. 1982); *Rex*, 493 F. Supp. at 469; Lonon v. Campanhia de Navegacao Lloyd Basileiro, 85 F.R.D. 71, 73 (E.D. Pa. 1979).

[158] *See Rex*, 660 F.2d at 64; *Ruggiero*, 639 F.2d at 875; *Williams*, 653 F.2d at 881. In fact, one court has recently held that the presence or absence of a jury is entirely independent of the congressional grant of jurisdictional authority to the district courts in section 1330(a). Houston v. Murmansk Shipping Co., 667 F.2d 1151, 1153 (4th Cir. 1982).

[159] *See* note 45 *supra* for the text of section 1441(d).

[160] *See, e.g.*, *Ruggiero*, 639 F.2d at 876 & n.7.

[161] *See, e.g.*, *Rex*, 660 F.2d at 64.

[162] *E.g.*, Houston v. Murmansk Shipping Co., 667 F.2d 1151, 1154 (4th Cir. 1982).

[163] *E.g.*, *Icenogle*, 82 F.R.D. at 39.

[164] *Id.*

[165] HOUSE REPORT, *supra* note 44, at 6611.

ity view holds that Congress, by the word "comprehensive," intended that in suits against foreign states section 1330(a) be the "sole" basis of jurisdiction.[166]

Courts adopting the minority approach perceive several problems with this broad statement of purpose.[167] First, they assert that it is illogical for a jurisdictional provision designed to be comprehensive not to state on its face that it is the sole basis of jurisdiction in suits against foreign states.[168] Second, these courts argue that in a "comprehensive jurisdictional scheme" such as section 1330(a), Congress would not withdraw the right to a jury trial without evaluating the possibility of constitutional violations.[169] Third, they note that the primary effect of limiting the district court's jurisdiction to section 1330(a) is to deny a jury trial in many cases usually tried by one simply because one party is a foreign state.[170]

The legislative history of section 1330(a) contains the assertion that "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous."[171] The majority of courts interpret this statement to foreclose jurisdiction in a suit against a foreign state under section 1332(a)(2).[172] Additionally, they assert the absence of a jurisdictional basis under section 1331 because it is inconsistent to permit jury trials in federal question actions against foreign states under section 1331(a), but not to allow them on diversity of citizenship grounds under section 1332(a)(2).[173]

The minority of courts base jurisdiction in suits against foreign states under both sections 1332(a)(2) and 1331.[174] Section 1332(a)(2) was first relied upon in the case of *Icenogle v. Olympic Airways, S.A.*,[175] in which the United States District Court for the District of Columbia held that even though there no longer was diversity jurisdiction over a foreign state itself after the passage of the FSIA, such jurisdiction remained when one party was a "*[citizen]* or [subject] of a

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[166] *See, e.g., Ruggiero*, 639 F.2d at 877; *Williams*, 653 F.2d at 878.

[167] *See, e.g., Rex*, 493 F. Supp. at 468.

[168] *Id.*

[169] *Id.* at 468 & n.10.

[170] *Id.* at 468, 469 n.14.

[171] HOUSE REPORT, *supra* note 44, at 6613.

[172] *See, e.g., Ruggiero*, 639 F.2d at 877-78; *Williams*, 653 F.2d at 880.

[173] *See, e.g., Rex*, 660 F.2d at 64; *Ruggiero*, 639 F.2d at 876.

[174] *Rex*, 493 F. Supp. at 469.

[175] 82 F.R.D. 36 (D.D.C. 1979). This case involved wrongful death actions brought by the estates of three United States citizens killed in the crash of an airplane owned by a Greek government controlled airline during a domestic flight between two cities in Greece. *Id.* at 36-37.

foreign state."[176] The court stated that the broad definition of "foreign state" in section 1603(a), which includes a foreign government-owned corporation,[177] is found in chapter 97 of title 28 and is expressly limited to that chapter,[178] while sections 1330(a)[179] and 1332(a)(2) are in chapter 85 of title 28.[180] Since there is a cross reference to section 1603(a) in section 1330(a)[181] but not in section 1332(a)(2), the *Icenogle* court concluded that the definition of "citizens or subjects of a foreign state" was not modified by sections 1603 or 1330, and was not "superfluous" to section 1332(a)(2).[182]

In contrast to the majority position, the minority view maintains that section 1331 is also a source of jurisdiction when the substantive basis of a suit against a foreign state is a federal statute.[183] Nonetheless, the majority view's criticism that the use of section 1331 irreconcilably authorizes a jury trial in federal question but not diversity actions stands unrebutted.

Congress stated in the legislative history of section 1330(a): "As in suits against the U.S. Government, jury trials are excluded. . . . Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved."[184] The

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[176] *Id.* at 37. *See* note 19 *supra* for the present text of section 1332(a). Before it was amended by the FSIA, the diversity jurisdiction statute stated:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and *foreign states* or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a) (1970) (amended 1976) (emphasis added).

The *Icenogle* court found that the section as amended preserved the original diversity jurisdiction of the federal courts in this type of case and that absent an unequivocal demonstration of contrary congressional intent, the traditional right to jury trial should be retained. 82 F.R.D. at 38.

[177] *See* note 40 *supra* for the text of section 1603.

[178] Section 1603 begins "[f]or purposes of this chapter." *See* 28 U.S.C. § 1603 (1976).

[179] *See* note 17 *supra* for the text of section 1330(a).

[180] 82 F.R.D. at 38.

[181] Section 1330(a) refers to "foreign state as defined in section 1603(a) of this title." *See* 28 U.S.C. § 1330(a) (1976).

[182] 82 F.R.D. at 38. Additionally, the court suggested that the references to "foreign state" in the legislative history were designed to apply only to foreign sovereigns and not to the section 1603 definition of foreign state and that, in any event, the wording of the statute not the legislative history, must prevail. *Id.* at 40.

[183] The district court in *Rex* reasoned that since a suit under the LHWCA was a "civil [action] . . . aris[ing] under the . . . laws . . . of the United States," section 1331 applied. 493 F. Supp. at 467-68.

[184] HOUSE REPORT, *supra* note 44, at 6611-12. *See* note 44 *supra* and accompanying text for the *Rex* majority's discussion of this quotation.

majority of courts claim that this declaration demonstrates an intent to deny jury trials in all cases where foreign states are concerned.[185]

The validity of this interpretation is questioned by the minority of courts. The analogy between actions against the United States and those against foreign states indicates to these courts that Congress intended to equalize the treatment of foreign states and their corporations in our courts with that of the United States government and its corporations, but not to completely deny jury trials in all cases.[186] Further, they reason that the necessity for "uniformity in decision" is greater when the government of a foreign state is implicated than when a commercial corporation owned by a foreign government is involved.[187]

As can be seen from the above analysis, both the minority and majority approaches lead to unsatisfactory results. The minority view distorts the meaning of the statute to find other sources of jurisdiction in order to avoid a conflict with the seventh amendment. The majority view meets this conflict directly, but then restricts the scope of the seventh amendment by narrowly defining the phrase "[s]uits at common law" to exclude actions against both foreign states and foreign government-owned corporations.

The ramifications of the majority's seventh amendment interpretation are disturbing. For example, an American plaintiff suing a

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[185] 660 F.2d at 65; *see Ruggiero*, 639 F.2d at 877-78; *Williams*, 653 F.2d at 879.

[186] *Icenogle*, 82 F.R.D. at 41. *See* von Mehren, *supra* note 2, at 45. Although the United States government is generally exempt from suit on the theory "that 'there can be no legal right as against the authority that makes the law on which the right depends,' " *Ruggiero*, 639 F.2d at 880 n.11 (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)), its commercial corporations are subject to contract and tort actions triable by jury in district court. *Icenogle*, 82 F.R.D. at 41 nn.9 & 10. An analogous situation existed before the passage of the FSIA in 1976 with regard to foreign government-owned corporations. *Id.* at 38. Under the restrictive principle of sovereign immunity, foreign governments were granted immunity from suit in United States courts but their separate corporate entities were not. *Id.* at 38-39. The FSIA was designed to codify this practice by retaining the right to jury trial in suits involving foreign government-owned corporations who were "citizens or subjects of a foreign state," thus putting them on the same footing with United States government-owned corporations. *Id.* at 41-42; *see* HOUSE REPORT, *supra* note 44, at 6605. *See* notes 119-26 & 135-39 *supra* and accompanying text for the *Rex* dissent's discussion of this issue.

[187] *Icenogle*, 82 F.R.D. at 38-39. In passing the FSIA, Congress was primarily concerned that a lack of "uniformity in decision" in cases involving foreign governments would result in "adverse foreign relations consequences." HOUSE REPORT, *supra* note 44, at 6611. This concern must have been focused on "foreign governments" rather than foreign government-owned corporations, however, because before 1976 only one such entity had been granted sovereign immunity in United States courts. *Icenogle*, 82 F.R.D. at 39 & n.3. (citing Oliver American Trading Co. v. Mexico, 5 F.2d 659 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925)). Since uniformity of decision had been maintained up to that point in actions tried by juries under section 1332(a)(2), 82 F.R.D. at 39, further "promotion" in this area was not required by the passage of the FSIA. *See* notes 129-34 *supra* and accompanying text for the *Rex* dissent's discussion of this question.

foreign government-owned corporation in federal court is denied a jury trial under section 1330(a),[188] while the same corporation suing the American as a defendant may have a jury trial under section 1332(a)(4).[189] Additionally, the proclaimed procedural advantages of the FSIA, such as in personam jurisdiction,[190] statutory rules for service of process,[191] and execution of judgment,[192] do not appear to outweigh the detriment suffered by the injured American plaintiff's loss of the important right to a jury at the trial of the case on its merits. Therefore, another solution which retains the intent of the statute and legislative history but avoids these pitfalls is necessary.

A novel response to the jury trial problem was originally advanced in *Outboard Marine v. Pezetel*,[193] by the United States District Court for the District of Delaware. The court recommended the establishment of coordinate trials in which the judge determines the facts with regard to the sovereign government and a jury decides the facts pertaining to the non-sovereign defendants.[194] A similar solution was later proposed in the United States District Court for the District of Maryland in *Houston v. Murmansk Shipping Co.*[195]

The district court in *Houston* construed the legislative history of section 1330(a) to mean that Congress intended a two-part system of adjudication.[196] The judge alone would determine whether the defendant was entitled to sovereign immunity and the jury would then decide the merits of the case, assuming diversity jurisdiction was present.[197] Inasmuch as the *Houston* court relied on section 1332(a)(2), this plan follows the minority jurisdictional view.[198]

Unsure whether the FSIA required a non-jury trial and cognizant that the Court of Appeals for the Fourth Circuit had docketed the *Williams* case, an appeal on this question, the *Houston* district court applied a modified version of its suggested plan, allowing the jury to try the case, but also recording its own findings.[199] The court rea-

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[188] For the text of section 1330(a), see note 17 *supra*.

[189] For the text of section 1332(a)(4), *see* note 19 *supra*.

[190] 28 U.S.C. § 1330(b) (1976).

[191] *Id.* § 1608.

[192] *Id.* §§ 1609-1611.

[193] 461 F. Supp. 384 (D. Del. 1978).

[194] *Id.* at 396.

[195] 87 F.R.D. 71 (D. Md. 1980), *rev'd*, 667 F.2d 1151 (4th Cir. 1982). This action was brought by a longshoreman who was seriously injured while unloading a ship owned by a Soviet government-controlled corporation. *Id.* at 72.

[196] *Id.* at 73.

[197] *Id.*

[198] *See* note 174 *supra* and accompanying text.

[199] Houston v. Murmansk Shipping Co., 667 F.2d 1151, 1152 (4th Cir. 1982).

soned that its non-jury determinations could be substituted for the jury's in the event that the court of appeals concluded in *Williams* that the FSIA necessitated a juryless trial.[200] This in fact occurred.[201] The *Houston* court of appeals was thus faced with the problem of what to do with the district court's set of contradictory jury and non-jury findings.[202]

On appeal, the United States Court of Appeals for the Fourth Circuit, in *Houston v. Murmansk Shipping Co.*,[203] reversed the lower court's decision and remanded the case for a new trial.[204] The opinion was specifically limited to the question whether a trial without a jury was an essential element in defining the district court's jurisdiction under section 1330(a).[205] The court of appeals held that the existence of jurisdiction was independent of the presence or absence of a jury in the courtroom.[206] Once jurisdiction was established, however, the court found that its previous decision in *Williams*[207] mandated that a non-jury trial take place.[208]

The court of appeals decision in *Houston* supports the trial court's bifurcated system by treating jurisdiction and the right to a trial by jury as separate questions. This support is not vitiated by the Court of Appeals for the Fourth Circuit's ultimate holding that a non-jury trial is required following the determination of jurisdiction. The result is a reflection of the precedential effect of its previous decision in *Williams*, which foreclosed the jury trial option.

A recommended alternative, which combines the *Houston* court's jurisdictional analysis with the majority position's interpretation of the exclusivity of section 1330(a), is to employ a bifurcated trial. Under this procedure, the judge first determines whether the foreign defendant is entitled to sovereign immunity. Jurisdiction attaches if the judge finds that the defendant is a foreign state as defined in section 1603(a) and is not immune under 28 U.S.C. §§ 1605 to 1607.[209] Once the judge decides that jurisdiction is established, the plaintiff is then entitled to a jury trial on the merits.

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[200] *Id.*

[201] *Williams*, 653 F.2d at 833. *See* notes 54-62 *supra* and accompanying text for a discussion of the *Williams* case.

[202] Houston v. Murmansk Shipping Co., 667 F.2d 1151, 1153 (4th Cir. 1982).

[203] 667 F.2d 1151 (4th Cir. 1982).

[204] *Id.* at 1153.

[205] *Id.*

[206] *Id.*

[207] In addition to *Williams*, the court also cited *Ruggiero* and *Columbia Note*, *supra* note 6. *See* 667 F.2d at 1153.

[208] 667 F.2d at 1153.

[209] *See* 28 U.S.C. §§ 1605-1607 (1976) (nature and extent of liability) (incorporated by reference in section 1330).

Even though this suggestion appears at first glance to contradict the "nonjury civil action" language of section 1330(a), a closer look reveals that it does not. A comparison of section 1330(a) with sections 1331 and 1332 discloses a general structural similarity. The major difference is that section 1330(a) contains the phrase "nonjury" while the other sections do not.[210] One explanation for this deviation supported by the legislative history is that Congress was simply trying to ensure that a judge would resolve the sensitive question of foreign sovereign immunity.[211] Hence, the word "nonjury" in section 1330(a) mandates a trial by the judge only on the question of jurisdiction, but not on the substantive issues of the case.

This dual system is a workable alternative to the minority and majority solutions outlined above because it reflects an acceptable reading of the statute and legislative history while preventing a conflict with the seventh amendment. Questions of prejudice against foreign sovereign-owned corporations resulting from a jury trial[212] must be balanced with the detriment suffered by Americans who, although they may have the procedural ability to serve process and execute judgments,[213] are precluded from a trial by jury on the substantive issues in suits against foreign states when they are plaintiffs but not defendants.[214] The application of this system will protect the rights of foreign government-owned corporations through a judicial determination of jurisdiction, and will guarantee United States citizens a jury trial on the merits of their case.

Linda R. Gardner

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[210] *Compare* the texts of section 1330(a), *supra* note 17, *with* section 1331, *supra* note 18, *and* section 1332, *supra* note 19.

[211] HOUSE REPORT, *supra* note 44, at 6606.

[212] The question of prejudice arose, for example, in *Ruggiero*. 639 F.2d at 880 n.12.

[213] *See* notes 191-92 *supra* and accompanying text.

[214] *See* notes 188-89 *supra* and accompanying text.