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JURISDICTION AND JURY TRIALS IN ACTIONS AGAINST FOREIGN GOVERNMENT OWNED CORPORATIONS

To establish federal jurisdiction over a foreign corporation, a United States citizen traditionally alleged jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332.[1] A party to a diversity action against a foreign corporation could demand a jury trial.[2] In 1976, however, Congress passed the Foreign Sovereign Immunities Act (Act),[3] which provides for federal jurisdiction over the commerical acts[4] of foreign states

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[1] *See* 28 U.S.C. § 1332(a)(2) (1976). Section 1332(a)(2) provides for federal jurisdiction over suits brought by United States citizens against citizens or subjects of a foreign state. *Id.* Traditionally, foreign corporations, even those owned by foreign governments, were considered citizens or subjects of a foreign state for the purposes of § 1332. *See, e.g.*, Barrow S.S. Co. v. Kane, 170 U.S. 100, 106 (1898) (British corporation a foreign citizen subject to diversity jurisdiction); National S.S. Co. v. Tugman, 106 U.S. 118, 121 (1882) (British corporation a foreign citizen); Eck v. United Arab Lines, Inc., 360 F.2d 804, 806-11 (2d Cir. 1966) (diversity jurisdiction allowed over foreign government owned airline); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 534 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (allowing diversity jurisdiction over airline owned by foreign government); Windert Watch Co. v. Remex Electronics, Ltd., 468 F. Supp. 1242, 1246 (S.D.N.Y. 1979) (British corporation a foreign state); Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., 334 F. Supp. 1013, 1015 (S.D.N.Y. 1971) (Swiss corporation a foreign citizen subject to diversity jurisdiction). *See generally*, 1 MOORE'S FEDERAL PRACTICE ¶ .75[3] (2d ed. 1980); Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Enterprise*, 74 HARV. L. REV. 1489, 1524-51 (1961).

[2] *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 534 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Koninkljke Luchtraart Maatschuppij N.V. KLM v. Tuller, 292 F.2d 775, 777-85 (D.C. Cir. 1961). Section 1332 neither specifically permits nor denies jury trials in diversity actions, and therefore, the federal courts consistently have allowed jury trials in actions against foreign corporations. *See* 346 F.2d at 535-36; 292 F.2d at 782.

[3] 28 U.S.C. §§ 1330, 1391, 1441, & 1602-11 (1976). Congress intended to accomplish four objectives through the Act. *See* H.R. REP. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as *House Report*]. Congress intended to codify the restrictive theory of sovereign immunity, shift the decision-making power in sovereign immunity issues from the Executive Branch to the Judiciary, provide a statutory procedure for serving process upon and obtaining jurisdiction over foreign sovereigns, and provide a statutory procedure for executing judgments obtained against foreign sovereigns. *Id.* at 6605-06.

[4] *See* 28 U.S.C. § 1605 (1976). The Act limits the jurisdictional immunity of foreign states to acts which are done for public purposes of the sort in which nations traditionally have engaged, such as the conduct of diplomatic, military, or political affairs. *Id.* The Act denies immunity for acts which are done for a commercial purpose if the commercial activity directly affects or has a substantial contact with the United States. *Id.* § 1605(a)(2) (1976). *See generally* Dellapena, *Suing Foreign Governments and Their Corporations: Sovereign Immunity*, 85 COMM. L.J. 167, 230-33 (1980) [hereinafter cited as *Dellapena*]; Note, *The*

and over foreign government owned corporations in section 1330.[5] Section 1330 of the Act prohibits jury trials in actions against foreign corporations.[6] In several recent cases, federal courts have divided over the question whether section 1330 jurisdiction over foreign government owned corporations is now exclusive of section 1332 diversity jurisdiction.[7] Since section 1330 prohibits jury trials, these courts also have addressed the issue whether the seventh amendment guarantees the right to a jury trial in suits against foreign government owned corporations.[8]

In the past, if a foreign government owned or ran a corporation,[9]

Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court, 46 FORDHAM L. REV. 543, 550-52 (1977). Commentators have noted that the Act's restriction of sovereign immunity will create difficult problems of interpretation in distinguishing a foreign state's commercial and noncommercial activities. *See* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009, 1031-35 (1979); Note, *Sovereign Immunity—A Statutory Approach to a Persistent Problem*, 1 B.C. INT'L. & COMP. L.J. 223, 261 (1977) [hereinafter cited as *A Statutory Approach*].

[5] *See* 28 U.S.C. § 1330(a) (1976). Section 1330 grants the federal district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action..." against a foreign state or foreign government owned corporation which fails to qualify for immunity under the Act. *Id.*

[6] *See* note 5 *supra.*

[7] Since the passage of the Act in 1976, four courts have held that diversity jurisdiction over a foreign government owned corporation is proper under 28 U.S.C. § 1332. *See* Rex v. Compania Peruana de Vapores, S.A., 493 F. Supp. 459, 469 (E.D. Pa. 1980); Houston v. Murmansk Shipping Co., 87 F.R.D. 71, 75 (D. Md. 1980); Lonon v. Compania de Navegacao, Lloyd Brasileiro, 85 F.R.D. 71, 73 (E.D. Pa. 1979); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36, 36-38 (D.D.C. 1979). *Contra*, Ruggiero v. Compania Peruana de Vapores, S.A. 639 F.2d 872, 878 (2d Cir. 1981); Jones v. Shipping Corp. of Ind., 491 F. Supp. 1260, 1263 (E.D. Va. 1980); Williams v. Shipping Corp. of Ind., 489 F. Supp. 526, 528 (E.D. Va. 1980) (*Memorandum Order*); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 396 (D. Del. 1978).

[8] The seventh amendment requires jury trials in certain types of civil actions. *See* note 74 *infra.* Three courts have indicated that the Act's denial of jury trials may violate the seventh amendment. *See* Rex v. Compania Peruana de Vapores, S.A., 493 F. Supp. 459, 463-66 (E.D. Pa. 1980); Lonon v. Compania de Navegacao, Lloyd Brasileiro, 85 F.R.D. 71, 73 (E.D. Pa. 1979); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36, 40 (D.D.C. 1979). Several courts have held that the Act's preclusion of jury trials in actions against foreign governments and their commercial corporations does not violate the seventh amendment. *See* Ruggiero v. Compania Peruana de Vapores, S.A., 639 F.2d 872, 881 (2d Cir. 1981); Herman v. El Al Israel Airlines, Ltd., 502 F. Supp. 277, 280 (S.D.N.Y. 1980); Williams v. Shipping Corp. of Ind., 489 F. Supp. 526, 532 (E.D. Va. 1980) (*Memorandum Order*). *See also* Houston v. Murmansk Shipping Co., 87 F.R.D. 71, 73 (D. Md. 1980) (construing the Act as requiring bifurcated trial, with court determining issues of sovereign immunity and jury determining issues of liability and damages); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 396 (D. Del. 1978) (the Act requires bifurcated trial).

[9] Since the turn of the century, many foreign governments have engaged in business activities that are undertaken by private citizens or organizations in the United States. *See generally* Allen, *State Trading and Economic Warfare*, 24 LAW & CONTEMP. PROB. 256, 257-59 (1959); Hazard, *State Trading in History and Theory*, 24 LAW & CONTEMP. PROB. 243, 243-55 (1959). Through the use of wholly owned corporations, foreign governments now

sovereign immunity[10] often precluded the assertion of United States jurisdiction. In absolute form, sovereign immunity barred suits against foreign government owned corporations whenever the suit was in reality a suit against the government that owned the corporation.[11] The jurisdictional immunity of foreign government owned corporations adversely affected United States citizens who engaged in commercial transactions with foreign government owned corporations and also denied recovery to United States citizens injured through torts commit-

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engage in such varied commercial activities as the production or manufacture of commodities, mining, international shipping, and national or international air transportation. *See* Friedmann, *Changing Social Arrangements in State-Trading States and Their Effect on International Law*, 24 LAW & CONTEMP. PROB. 350, 357-59 (1959); Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 109-112 (1961); Comment, *Sovereign Immunity of Foreign Government-Owned Airlines*, 18 J. AIR L. & COMM. 455, 457-58 (1951).

[10] *See generally* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 109 (3d ed. 1977); J. BRIERLY, THE LAW OF NATIONS 243 (6th ed. 1963); W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 87-99 (1979). Sovereign immunity promotes comity and international accord by affirming the dignity, independence, and sovereignty of foreign states. *See* United States v. Diekelman, 92 U.S. 520, 524 (1875); 1 OPPENHEIM, INTERNATIONAL LAW 239-42 (7th ed. H. Lauterpacht 1948); Note, 1 GA. J. INTL & COMP. L. 133, 174 (1970); Comment, *Sovereign Immunity and the Foreign-State Enterprise in Alaska*, 4 UCLA-ALASKA L. REV. 343, 347-48 (1975). Sovereign immunity originated in the late medieval period as a courtesy between European monarchs. *See* Garcia-Mora, *The Doctrine of Sovereign Immunity of Foreign States and its Recent Modifications*, 42 VA. L. REV. 335, 336-37 (1956); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34-35 (1978) [hereinafter cited as von Mehren]. *See also* D. O'CONNELL, 2 INTERNATIONAL LAW 914-15 (1965) [hereinafter cited as O'Connell]; Dobrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1, 12-19 (1968). With consistent state practice, sovereign immunity became a norm of modern international law. *See* O'CONNELL, *supra*, at 915. United States courts traditionally emphasize the importance of sovereign immunity to international relations. *See* Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562, 570-76 (1926); United States v. Diekelman, 92 U.S. 520, 524 (1876) (dictum); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 135-39 (1812). Some authorities, however, indicate that sovereign immunity is inconsistent with modern concepts of the responsibilities of states. *See* Chemical Nat. Resources, Inc. v. Republic of Venez., 420 Pa. 134, 194, 215 A.2d 864, 893 (1966) (Musmanno, J., dissenting), *cert. denied*, 385 U.S. 822 (1966); *C. Eagleton, The Responsibility of States in International Law* 206-08 (1928); Reeves, *The Foreign Sovereign Before United States Courts*, 38 FORDHAM L. REV. 455, 496 (1970) [hereinafter cited as Reeves].

[11] *See, e.g.*, Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 707-10 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1930) (sovereign immunity granted to Royal Administration of the Swedish State Railroad); Oliver Am. Trading Co. v. Mexico, 5 F.2d 659, 661-65 (2d Cir. 1924) (sovereign immunity granted to railroad owned and operated by Mexican government); The Maipo, 259 F. 367, 368 (S.D.N.Y. 1919) (sovereign immunity granted to cargo vessel owned by Chilean government). *But see* U.S. v. Deutsches Kalisndikat Gesellschaft, 31 F.2d 199, 202 (S.D.N.Y. 1929) (foreign government owned mining corporation denied sovereign immunity in antitrust suit). *See generally* Hervey, *The Immunity of Foreign States When Engaged In Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751, 753 (1929).

ted by such corporations.[12] Consequently, the State Department in 1952 issued the Tate Letter, which suggested that the courts follow State Department directives on whether to grant sovereign immunity to foreign states and their corporations.[13] The Tate Letter noted that the State Department would distinguish the public and private activities of foreign governments and grant sovereign immunity only in suits arising from public acts.[14] Thereafter, the courts followed State Department directives on sovereign immunity issues,[15] and utilized the Department's public and private act distinction in cases where the Department did not issue a directive.[16] The Act carries forward the Tate Letter's restrictive

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[12] *See, e.g.*, Republic of Mex. v. Hoffman, 324 U.S. 30, 31 (1945) (sovereign immunity denied United States plaintiff recovery for maritime tort); Ex Parte Peru, 318 U.S. 578, 580 (1943) (sovereign immunity precluded recovery for breach of contract). *See generally* Reeves, *supra* note 10, at 455-57; *Recent Development, Foreign Sovereign Immunities Act of 1976—Judicial Predominance*, 4 BROOKLYN J. INT'L L. 146, 146-47 (1977); *House Report, supra* note 3, at 6605.

[13] *See* Letter from Jack B. Tate, State Department Acting Legal Advisor, to Acting Attorney General Phillip B. Perlman (May 19, 1952), *reprinted in* 26 *Dep't State Bull.* 984-85 (1952) [hereinafter cited as the Tate Letter]. *See generally* Editorial Comment, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 93-106 (1953). The Tate Letter, *supra*, affirmed the practice of judicial deference to the State Department in matters of sovereign immunity. The Supreme Court acknowledged and followed State Department suggestions on sovereign immunity issues on two occasions prior to 1952. *See* Republic of Mex. v. Hoffman, 324 U.S. 30, 38 (1945) (following suggestion of immunity when State Department merely noted foreign sovereign's ownership of libeled vessel); Ex Parte Peru, 318 U.S. 578, 587-89 (1943) (following actual suggestion of immunity).

[14] *See* the Tate Letter, *supra* note 13. The Tate Letter failed to state standards for determining whether a particular act was public or private. *Id.*; *see* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 359-60 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); note 16 *infra*.

[15] *See* National City Bank v. Republic of China, 348 U.S. 356, 358 (1955); Rich v. Naviera Vacuba, 197 F. Supp. 710, 724-26 (E.D. Va.), *aff'd per curiam*, 295 F.2d 24, 26 (4th Cir. 1961); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 687 (S.D.N.Y. 1955). Commentators have criticized judicial deference to State Department directives as an improper abdication of judicial power which led to disposition of legal issues on grounds of momentary political expediency. *See generally* Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper*, 48 CORNELL L.Q. 461 (1963); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946). State Department directives frequently failed to give reasons for a suggestion to grant or deny sovereign immunity and did not indicate whether the Department had resolved the issue on legal or political grounds. See Chemical Nat. Resources, Inc. v. Republic of Venez., 420 Pa. 134, 177, 215 A.2d 864, 885 (1966), *cert. denied*, 385 U.S. 822 (1967) (Musmanno, J., dissenting); Note, *Sovereign Immunity*, 8 HARV. INT'L L.J. 388, 393-96 (1967). *See also* Southeastern Leasing Corp. v. Stern Dragger Belogorsk, 493 F.2d 1223, 1224 (1st Cir. 1974); Spacil v. Crowe, 489 F.2d 614, 615-22 (5th Cir. 1974).

[16] *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 357-62 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In *Victory Transport*, a branch of the Spanish Ministry of Commerce chartered a vessel owned by a United States shipping company for the delivery of grain from the United States to various Spanish ports. *Id.* at 356. The vessel was damaged while discharging the grain in Spanish ports that were

theory of sovereign immunity by providing in certain circumstances for federal court jurisdiction over foreign governments and their commercial corporations.[17] Congress, however, intended the Act to promote uniformity of decision by substituting unbiased judicial decisions based on statutory guidelines for the more political decisions of the State Department on issues of sovereign immunity.[18]

Several courts considering claims against foreign corporations have examined whether section 1330 of the Act is the exclusive basis for federal jurisdiction and whether section 1330's denial of trial by jury violates the seventh amendment. In *Icenogle v. Olympic Airways, S.A.*,[19] the court held that the Act does not preclude federal courts from retaining diversity jurisdiction against a foreign government owned corporation. The plaintiff in *Icenogle* brought a wrongful death action against Olympic Airways (Olympic), a corporation owned and controlled entirely by the government of Greece.[20] The plaintiff alleged diversity jurisdiction under section 1332 and demanded a jury trial.[21] Olympic argued that section 1330 of the Act constituted the exclusively applicable jurisdictional statute and moved to strike the demand for a jury trial.[22] The *Icenogle* court interpreted the language of section 1332[23] to include a grant of federal jurisdiction over foreign government owned corporations.[24] The *Icenogle* court thereby avoided the seventh amendment issue whether Congress could preclude a plaintiff from a jury trial under

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allegedly unsafe for a vessel of that size. *Id.* The vessel's owners brought suit against the Spanish charterer in the Southern District of New York, and the charterer claimed the bar of sovereign immunity. *Id.* at 355-57. The district court held that no sovereign immunity existed and the Second Circuit affirmed. *Id.* at 355-56. The Second Circuit enumerated five categories of activities performed by states that qualify under the restrictive theory of sovereign immunity. These categories were: (1) internal administrative acts, (2) legislative acts, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, and (5) public loans. *Id.* at 360. The Second Circuit found that the act of chartering a vessel for the carriage of wheat fell outside of the five categories and, therefore, held that the Comisaria General was not entitled to sovereign immunity. *Id.* at 360-62.

[17] *See* note 4 *supra*.

[18] *See House Report, supra* note 3, at 6607; note 15 *supra*.

[19] 82 F.R.D. 36 (D.D.C. 1979).

[20] *Id.* Icenogle consolidated wrongful death actions brought by the estates of two citizens of Wisconsin and one citizen of New York against Olympic Airways. *Id.* at 36-37. The decedents perished when one of the defendant's commercial airplanes crashed en route between two cities in Greece. *Id.*

[21] *Id.* at 37; *see* 28 U.S.C. § 1332(a)(2) (1976). Section 1332(a)(2) grants the federal district courts diversity jurisdiction over civil actions between "citizens of a State and citizens or subjects of a foreign state." *Id.*

[22] 82 F.R.D. at 37. In *Icenogle*, the defendant airline initially challenged both the court's jurisdiction and venue. *Id.* The defendant later withdrew the challenges and admitted liability. *Id.*

[23] *See* note 21 *supra*; text accompanying notes 45-51 *infra*.

[24] 82 F.R.D. at 38.

the Act.[25] The court indicated that avoiding the constitutional issue was the primary rationale for permitting diversity jurisdiction against foreign government owned corporations.[26]

In contrast to *Icenogle*, the procedural history of *Williams v. Shipping Corp. of India*[27] required the *Williams* court to determine the constitutionality of the Act's preclusion of jury trials.[28] In *Williams*, a United States longshoreman brought a personal injury action against a shipping corporation owned entirely by the government of India.[29] The plaintiff initiated his suit in Virginia state court and the defendant exercised a right of removal to federal court as permitted under section 1441 of the Act.[30] Section 1441 allows foreign government owned corporations sued in a state court to remove the action to the federal district court of the district where the action is pending and states that actions removed to the federal court system shall be tried without juries.[31] The *Williams* court held that section 1330 of the Act, triggered in this instance by section 1441, constituted the exclusive grant of federal jurisdiction over a foreign government owned corporation.[32] The *Williams* court then held

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[25] *Id.* at 39-40; *see* text accompanying notes 72-80 *infra*. The *Icenogle* interpretation of section 1332 follows a judicially created rule of construction that requires courts to avoid interpreting statutes in ways that raise constitutional issues unless such an interpretation is inescapable. *See* Lorillard v. Pons, 434 U.S. 575, 577 (1978); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974). The *Icenogle* court, however, may have overemphasized the importance of avoiding the constitutional issue created by section 1330's preclusion of jury trials, especially since avoiding the issue required the court to ignore congressional statements in the legislative history accompanying the Act. *See* Ruggiero v. Compania Peruana de Vapores, S.A., 639 F.2d 872, 876-77 (2d Cir. 1981). Moreover, the constitutionality of the Act's preclusion of jury trials arises whenever a foreign government owned corporation sued in a state court seeks removal to the federal court system. *See* text accompanying notes 30-31 *infra*.

[26] 82 F.R.D. at 40. *See also* Rex v. Compania Peruana de Vapores, S.A., 493 F. Supp. 459, 466 (E.D. Pa. 1980). In *Rex*, a United States longshoremen brought a personal injury action against a shipping corporation owned entirely by the government of Peru. 493 F. Supp. at 460-61. The plaintiff was injured while unloading one of the defendant's vessels, and brought his action pursuant to section 905(b) of the Longshoremen's and Harborworker's Compensation Act (LHWCA). *Id.* at 459; see 33 U.S.C. § 905(b) (1976). The *Rex* court followed the *Icenogle* analysis and granted diversity jurisdiction under section 1332. 493 F. Supp. at 466-67. The *Rex* court also developed an alternative means of avoiding the constitutional issue presented by section 1330's denial of jury trials. The *Rex* court granted jurisdiction under 28 U.S.C. § 1331, which allows the federal courts to assert jurisdiction over causes of action arising under the Constitution, laws, or treaties of the United States. *Id.* at 467-69; *see* 28 U.S.C. § 1331 (1976). The *Rex* court concluded that an action arising under section 905(b) of the LHWCA presents a federal question permitting the assertion of jurisdiction under section 1331. 493 F. Supp. at 467-68.

[27] 489 F. Supp. 526 (E.D. Va. 1980) (*Memorandum Order*).

[28] *Id.* at 28-30.

[29] *Id.* at 527.

[30] *Id.*; *see* 28 U.S.C. § 1441(d) (1976).

[31] *See* 28 U.S.C. § 1441(d) (1976).

[32] 489 F. Supp. at 528; *see* text accompanying notes 46-64 *infra*.

that the Act's denial of jury trials in sections 1330 and 1441 was constitutional.[33] The *Williams* court reasoned that a suit against a foreign government owned corporation was not a suit at common law within the meaning of the seventh amendment and therefore held that the amendment was inapplicable.[34]

In *Ruggiero v. Compania Peruana de Vapores, S.A.*,[35] the Second Circuit agreed with the *Williams* court and held that section 1330 of the Act was exclusive of section 1332 diversity jurisdiction and that section 1330 did not violate the seventh amendment. *Ruggiero* consolidated three personal injury actions involving United States longshoremen as plaintiffs and foreign government owned shipping companies as defendants.[36] The plaintiffs asserted diversity jurisdiction under section 1332 and moved for jury trials.[37] The defendants argued that jurisdiction existed exclusively under section 1330 of the Act and, therefore, moved to strike the demands for jury trials.[38] The district judge concluded in each case that jurisdiction existed only under section 1330 of the Act and, therefore, granted the motions to strike the demands for jury trials.[39] The district judge, however, certified the jury trial issue for immediate interlocutory appeal because the issue raised a difficult question of law upon which other district courts had reached conflicting conclusions.[40] Consequently, the Second Circuit could not avoid the constitutionality of section 1330's denial of jury trials as had the *Icenogle* court.[41] The Second Circuit first found that section 1330 of the Act operated exclusively of diversity jurisdiction under section 1332.[42] The Second Circuit then followed the *Williams* analysis and held that the Act's denial of jury trials did not violate the seventh amendment.[43] The Second Circuit also indicated that the Act's denial of jury trials against foreign government owned corporations benefits international relations by ameliorating the Act's restriction of the sovereign immunity of foreign governments and their corporations.[44]

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[33] 489 F. Supp. at 532.

[34] *Id.*; *see* text accompanying notes 73-81 *infra*.

[35] 639 F.2d 872 (2d Cir. 1981).

[36] *Id.* at 873. The plaintiffs in *Ruggiero* incurred personal injuries in New York while unloading the defendant's vessels. *Id.* The plaintiffs brought personal injury actions pursuant to section 905(b) of the Longshoremen's and Harbor Worker's Compensation Act. *Id.*; *see* 33 U.S.C. § 905(b) (1976). The defendant shipping companies were wholly owned subsidiaries of the governments of Peru, Poland, and Indonesia. 639 F.2d at 873.

[37] 639 F.2d at 873.

[38] *Id.*

[39] *See* Ruggiero v. Compania Peruana de Vapores, 498 F. Supp. 10, 12-14 (E.D.N.Y. 1980) (*Memorandum Decision and Order*), *aff'd*, 639 F.2d 872 (2d Cir. 1981).

[40] *Id.* at 14; *see* 28 U.S.C. § 1292(b) (1976) (interlocutory appeals statute); note 7 *supra*.

[41] *See* text accompanying notes 24-26 *supra*.

[42] *See* 639 F.2d at 878.

[43] *Id.* at 881.

[44] *Id.* at 880-81.

The *Icenogle* court's conclusion differed from that of the *Williams* and *Ruggiero* courts because the *Icenogle* court relied on the traditional application of section 1332 to foreign government owned corporations.[45] Section 1332 grants federal diversity jurisdiction in actions involving "citizens of a State and citizens or subjects of a foreign state."[46] The *Icenogle* court reasoned that a foreign government owned corporation is a citizen or subject of a foreign state and consequently is subject to diversity jurisdiction.[47] The *Icenogle* interpretation follows the traditional legal fiction that foreign corporations are citizens or subjects of the foreign state in which they are incorporated.[48] The Act, however, apparently modifies this fiction in regard to corporations that are owned or operated by a foreign state.[49] Section 1603 of the Act defines foreign government owned corporations as "foreign states" rather than "citizens or subjects of a foreign state."[50] Section 1603's definition indicates that Congress intended to preclude the federal courts from asserting diversity jurisdiction over foreign government owned corporations by

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[45] *See* 82 F.R.D. at 37-39.

[46] *See* 28 U.S.C. § 1332(a)(2) (1976).

[47] *See* 82 F.R.D. at 37-38.

[48] *See* Barrow S.S. Co. v. Kane, 170 U.S. 100, 106 (1898); National S.S. Co. v. Tugman, 106 U.S. 118, 121 (1882). The *Barrow* and *Tugman* decisions simply extended the legal fiction under which privately owned United States corporations were citizens of the state of their incorporation. *See* Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314, 327-28 (1853); Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844). *See generally* Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 202-228 (1946); Moore & Weckstein, *Corporations and Diversity Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427-30 (1964); Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 661 (1933).

[49] *See* text accompanying notes 50-64 *infra*.

[50] *See* 28 U.S.C. § 1603(a) (1976). Section 1603(a) states that "a 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. . ." *Id.* Section 1603(b) defines "an agency or instrumentality of a foreign state" as "any entity— (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b) (1976); *see House Report, supra* note 3, at 6613-14. Several recent decisions have relied upon the definition of a foreign state found in section 1603(a). *See, e.g.*, Carey v. National Oil Corp., 592 F.2d 673, 676 n.1 (2d Cir. 1979) (corporation wholly owned by Libyan government a "foreign state" for jurisdictional immunity purposes); Herman v. El Al Israel Airlines, Ltd., 502 F. Supp. 277, 278 (S.D.N.Y. 1980) (foreign government owned airline a "foreign state" under section 1603(a)); United Euram Corp. v. Union of Soviet Socialist Republics, 461 F. Supp. 609, 610-12 (S.D.N.Y. 1978) (joinder of U.S.S.R. and Soviet Ministry of Culture as co-defendants proper in light of Ministry's supervision of commercial negotiations between United States plaintiff and Soviet defendant); Yessenin-Volpin v. Novisti Press Agency, 443 F. Supp. 849, 851-54 (S.D.N.Y. 1978) (63% Soviet ownership and essentially public nature of foreign press agency establish that agency is "foreign state"). *But see* Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827, 831-32 (D.C. Cir. 1977) (Yugoslavian power plant operated by "worker's organization" not an "agency or instrumentality of a foreign state"). *See generally* 12 VAND. J. TRANSNAT'L L. 165 (1979).

destroying the fiction that such corporations are foreign citizens or subjects.[51]

The legislative history of the Act reenforces the *Williams* and *Ruggiero* construction of sections 1330 and 1332.[52] The legislative history indicates that section 1330's comprehensive treatment of jurisdiction in actions against foreign states renders superfluous a similar basis under section 1332.[53] The *Icenogle* court, however, noted that the term "foreign state" as used in the legislative history may mean a "foreign government" rather than a "foreign state" as defined in section 1603 of the Act.[54] Consequently, the *Icenogle* court declined to interpret the term "foreign state" as used in the legislative history to include foreign govenment owned corporations.[55] Similarly, the *Icenogle* court noted that section 1603 of the Act is a part of Chapter 97 of Title 28 and expressly limits the applicability of its definition of "foreign state" to Chapter 97.[56] Since section 1332 is not a part of Chapter 97, the *Icenogle* court held that section 1603's definition of a foreign state should not influence the interpretation of section 1332.[57] The *Icenogle* court, therefore, held that although a foreign government owned corporation is a foreign state under section 1330, the same corporation is a foreign citizen or subject under section 1332.[58] The *Icenogle* interpretation of sections 1330 and 1332, however, renders section 1441 of the Act unnecessary.[59] Congress had no reason to deny the right to jury trials in removed cases involving foreign government owned corporations, but not in actions originally brought in the federal court system.[60]

The 1976 amendment of section 1332 further indicates that Congress intended to deny diversity jurisdiction in actions against foreign government owned corporations.[61] Prior to 1976, section 1332 permitted federal diversity jurisdiction over suits between "citizens of a State, and foreign

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[51] *See* 639 F.2d at 875; 489 F. Supp. at 528.

[52] *See* 639 F.2d at 876-78; 489 F. Supp. at 528; text accompanying note 53 *infra*.

[53] *See House Report, supra* note 3, at 6613.

[54] *See* 82 F.R.D. at 40; note 50 *supra*. Prior to the Act, courts interpreted the term "foreign state" to mean "other nations" and "other countries." *See* Republique Francaise v. M. K. & T. R. Co., 85 F. Supp. 295, 296 (D. Tex. 1949).

[55] 82 F.R.D. at 40.

[56] *Id.* at 38; *see* 28 U.S.C. § 1603(a) (1976).

[57] 82 F.R.D. at 38. Section 1332(a)(4) grants federal diversity jurisdiction over actions brought against a United States citizen by "a foreign state, [as] defined in section 1603(a) of this title. . ." 28 U.S.C. § 1332(a)(4) (1976). Thus, the *Icenogle* interpretation of section 1332 may be incorrect since section 1332, read as a whole, does cross-reference to section 1603(a) of the Act.

[58] 82 F.R.D. at 38. The *Ruggiero* court, however, noted that an entity cannot be both a foreign state and a citizen or subject of a foreign state. 639 F.2d at 875.

[59] *See* 28 U.S.C. § 1441(d) (1976); text accompanying notes 30-31 *supra*.

[60] *See* 639 F.2d at 876 n.7.

[61] *See* text accompanying notes 62-64 *infra*.

states or citizens or subjects thereof."[62] The Act, however, amended section 1332 by deleting the reference to "foreign states" from the statute's grant of jurisdiction.[63] Congress apparently intended the amendment of section 1332 to preclude courts from asserting diversity jurisdiction over foreign government owned corporations as "foreign states" under section 1603's broad definition of a foreign state.[64] The *Icenogle* holding ignores the implications of Congress' broad definition of a "foreign state" and the effect of that definition had Congress not amended section 1332. In contrast, the *Williams* and *Ruggiero* opinions give effect to Congress' broad definition of a "foreign state" by holding that a foreign government owned corporation is a foreign state suable only under section 1330 of the Act, rather than a citizen or subject of a foreign state subject to diversity jurisdiction under section 1332.

The *Williams* and *Ruggiero* construction of sections 1330 and 1332 is consistent with the probable congressional purpose for denying jury trials in actions against foreign government owned corporation.[65] Congress recognized that provisions which subjected foreign governments and their commercial corporations to trial by jury could harm international relations.[66] Foreign states might object to their corporations being

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[62] *See* 28 U.S.C. § 1332(a)(2) (1976).

[63] *See* 639 F.2d at 873-75; 489 F. Supp. at 528; 28 U.S.C. § 1332(a)(2) (1976).

[64] *See* 639 F.2d at 875; 489 F. Supp. at 528.

[65] The legislative history accompanying the Act merely notes that jury trials against foreign sovereigns are excluded under section 1330 to promote "uniformity of decision." *See House Report, supra* note 3, at 6611-12. Congress failed to discuss the jury trial issue further and neglected to analyze the seventh amendment issue raised by the Act's denial of jury trials. *See* Dellapena, *supra* note 4, at 499-501 (jury trial issue received "scant" attention from drafters of the Act); 13 VAND. J. TRANSNAT'L L. 219, 230 n.87 (1980) (proposing amendment of Act to clarify congressional intent to deny jury trials). Congress apparently intended the preclusion of jury trials against foreign states, however, for the Act specifically denies jury trials in two separate sections. *See* 28 U.S.C. §§ 1330, 1441(d) (1976) (denying jury trials in actions coming before federal courts on both direct and removal jurisdiction).

[66] According to the legislative history of the Act, Congress determined that shifting the power to decide issues of sovereign immunity from the Executive to the Judicial branch would benefit international relations and the conduct of the United States' foreign affairs by resolving issues of sovereign immunity with greater objectivity and uniformity. *See House Report, supra* note 3, at 6607. The Act's restriction of sovereign immunity to the noncommercial or "public" acts of foreign states probably accords with customary international law. *Id.* at 6613. The courts of Belgium, Greece, Italy, Egypt, Austria, Switzerland, Ireland, Canada, Pakistan, and the United States follow restrictive theories of sovereign immunity. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 327 n. 1 (3d ed. 1979). *See also* Deak, ORGANS OF STATES IN THEIR EXTERNAL RELATIONS: IMMUNITIES AND PRIVILEGES OF STATE ORGANS AND OF THE STATE § 7.5 *in* MANUAL OF PUBLIC INTERNATIONAL LAW (1967); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. YB INT'L L. 220, 223 (1951); von Mehren, *supra* note 10, at 36-37. The Soviet bloc and other communist or socialist nations, however, adhere to a theory of absolute sovereign immunity and therefore some authorities argue that the restrictive theory adopted by the Act may not be an accepted rule of customary international law. *See Brownlie, supra*, at 328 n.5. *See generally*, L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW 496-98 (1980);

subject to American juries, particularly if they do not employ the jury system in their domestic law or are generally unpopular in the United States.[67] Communist nations could be particularly hostile to jury trials in the United States, since such nations make no distinction between the commercial and noncommercial acts of a sovereign state and, therefore, adhere to the doctrine of absolute sovereign immunity.[68] Additionally, developing nations that find massive government involvement in commercial affairs an economic necessity could view hostile jury verdicts as an attempt by the United States to dominate their economies and control the disposition of their natural resources.[69]

The Act's requirement of non-jury trials also eliminates the possibility for abuse of the jury process which is present in actions against foreign governments and their commercial corporations.[70] Parochialism and national prejudice sway far fewer judges than juries, particularly since judges are more sensitive to the possibility of appellate review and reversal for error.[71] By subjecting foreign government owned corporations to federal jurisdiction only under the Act, and thereby denying jury trials against such corporations, the *Williams* and *Ruggiero* courts

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LISSITZYN, SOVEREIGN IMMUNITY AS A NORM OF INTERNATIONAL LAW, *in* TRANSNATIONAL LAW IN A CHANGING SOCIETY 188-201 (1972).

[67] *See* 639 F.2d at 880; 13 VAND. J. TRANSNAT'L L. 219, 228-31 (1980). Commentators have noted that procedures which are acceptable under the domestic law of the United States may be considered unacceptable by foreign governments. For example, United States procedures for longarm jurisdiction and the assertion of extraterritorial judicial power may exceed the jurisdictional standards of foreign states. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966).

[68] *See* note 66 *supra.*

[69] *See A Statutory Approach, supra* note 4, at 260-61. Developing nations are particularly hostile to efforts by developed nations to control the natural resources of newly independent countries. *Id.*

[70] *See* 639 F.2d at 880. Courts might minimize the potential for abuse of the jury process in actions against foreign government owned corporations by exercising strict control over the jury's actions and decisions. *See* 13 VAND. J. TRANSNAT'L L. 219, 229 (1980). Courts could use such control devices as additur, remititur, directed or special verdicts, or judgment n.o.v. to avoid the suspicion of unfairness to foreign government owned corporations sued under the Act. *Id.* Such control devices, however, could prove cumbersome and time-consuming and might in many cases prove ineffective in convincing foreign states that passion or prejudice did not infect the verdict.

[71] *See* Zschernig v. Miller, 389 U.S. 429, 435-41 (1967). The issue in *Zschernig* was the constitutionality of an Oregon probate statute that allowed a non-resident alien heir to take personalty only if the alien's foreign country would permit a United States citizen to take personalty under similar circumstances. *Id.* at 430-32. The Court held that the Oregon statute was an unconstitutional intrusion by the state into the foreign affairs power of the President and of Congress. *Id.* at 432. The *Zschernig* Court noted several extremely parochial and nationalistic statements made by state judges while applying Oregon's or similar "reciprocity" statutes. *Id.* at 436-41. *Zschernig* demonstrates that the Court would not fail to harshly criticize unobjective decision-making by courts in issues involving foreign governments and foreign government owned corporations. *See generally* 8 VA. J. INT'L L. 419, 426 n.10 (1968); 13 VILL. L. REV. 672, 676 (1968).

promoted the congressional desire to avoid adverse effects on foreign relations through the passage of the Act.[72]

In addition, the Act's denial of trial by jury in actions against foreign government owned corporations is not inconsistent with the seventh amendment.[73] The seventh amendment preserves rather than expands the right to a jury trial as it existed at common law.[74] Ordinarily, if the right to a jury trial for a particular cause of action existed in England in 1791, then the seventh amendment maintains that right.[75] The seventh amendment, however, does not guarantee the right to a jury trial where no right to enforce similar legal claims existed at common law.[76] No right to a jury trial in an action against a foreign sovereign existed at common law, because at that time all nations followed a theory of absolute sovereign immunity which totally precluded suits against foreign sovereigns.[77] An examination of the history of the seventh amendment

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[72] *See* note 66 *supra.*

[73] *See* 639 F.2d at 880-81; 489 F. Supp. at 531-32.

[74] *See* 5 MOORE'S FEDERAL PRACTICE ¶ 38.08 [5], at 38-55 (2d ed. 1980) [hereinafter cited as MOORE'S]. The seventh amendment states that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." *U.S. Const.* amend VII. Courts traditionally have protected the right to jury trials in civil actions. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) (right to jury trial in civil actions fundamental to Anglo-American legal system); Galloway v. United States, 319 U.S. 372, 398 (1943) (Black, J., dissenting) (right to jury trial in civil action "the very palladium of free government"); Jacob v. New York, 315 U.S. 752, 753 (1942) (seventh amendment protection a fundamental and sacred right).

[75] *See* Ross v. Bernhard, 396 U.S. 531, 543 (1969) (Stewart, J., dissenting); 5 MOORE'S FEDERAL PRACTICE ¶ 38.05, at 38-55; Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639-40 (1973).

[76] *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 449 & 459 (1977); Pernell v. Southall Realty, 416 U.S. 367, 375 (1974); Curtis v. Loether, 415 U.S. 189, 195 (1974). In *Atlas*, the Supreme Court held that the seventh amendment did not require jury trials in OSHA proceedings, because administrative agencies and proceedings were unknown at common law. *See* 430 U.S. at 449-55. *Curtis* raised the issue whether the seventh amendment requires jury trials in actions arising under the Civil Rights Act of 1968, 42 U.S.C. § 3604(a) (1976). 415 U.S. at 190. The *Curtis* court held that the seventh amendment required a jury trial in actions arising under the Civil Rights Act. *Id.* at 191. The Court reasoned that claims arising under the Civil Rights Act constitute actions to enforce "legal rights" of the sort guaranteed a jury trial by the seventh amendment. *Id.* at 196.

The Supreme Court refined the *Curtis* analysis in *Pernell*. The issue in *Pernell* was whether eviction proceedings brought under the District of Columbia Housing Code required a jury trial under the seventh amendment. 416 U.S. at 364. The *Pernell* court reasoned that a jury trial was proper because the action was similar in function to various common law actions traditionally held to require jury trials. *Id.* at 375.

[77] *See* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 137-40 (1812). The *Exchange* Court determined that international law required the adoption of a theory of absolute sovereign immunity. *Id.* at 137-38. The *Exchange* Court reasoned that through an implied contract all sovereign nations have agreed not to assert domestic jurisdiction over one another, in order to benefit comity and facilitate trade, intercourse, and the conduct of diplomatic affairs. *Id.*; *see* O'CONNELL, *supra* note 10, at 916; von Mehren, *supra* note 10, at

fails to indicate clearly whether the absolute theory of sovereign immunity would have precluded suits at common law against corporations owned or operated by foreign sovereigns.[78] The issue never arose, because foreign government owned corporations did not exist in that time period.[79] Nevertheless, courts at common law could have extended sovereign immunity to foreign government owned corporations had such corporations then existed.[80] The drafters of the seventh amendment, therefore, probably did not intend suits at common law to include actions against foreign government owned corporations.[81] The *Williams* and *Ruggiero* courts, therefore, properly determined that the Act's denial of jury trials does not violate the seventh amendment.

The *Williams* and *Ruggiero* courts correctly held that the Act constitutes the exclusive means of obtaining federal court jurisdiction over a corporation owned or operated by a foreign government.[82] Both decisions properly recognized that the Act's denial of trial by jury benefits international relations[83] and does not conflict with the requirements of

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35-36. English courts traditionally have followed the *Exchange* Court's theory of absolute sovereign immunity. *See* O'CONNELL, *supra* note 10, at 916-17.

[78] *See* 5 MOORE'S, *supra* note 74, at ¶ 38.31.1[2].

[79] *See* note 9 *supra*; note 80 *infra*.

[80] In 1812 the United States Supreme Court adopted a theory of absolute sovereign immunity, but anticipated the possibility of denying sovereign immunity in suits arising from the commercial activities of a foreign sovereign. *See* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 145 (1812). The *Exchange* Court indicated that a sovereign ordinarily did not engage in commerce and noted that a sovereign who did so might waive his immunity from jurisdiction. *Id.* at 145. Such a case did not come before the Supreme Court, however, until 1926, near the beginning of the era of government involvement in commercial activities. *See* Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562, 572-76 (1926). The *Pesaro* Court affirmed the *Exchange* Court's theory of absolute sovereign immunity and refused to distinguish the public and private acts of a foreign sovereign. *Id.* Other Anglo-American courts of the same period also adhered to the theory of absolute sovereign immunity. *See* The Maipo, 252 F. 627, 628-31 (S.D.N.Y. 1918), *vacated*, 259 F. 367, 368 (S.D.N.Y. 1919); The Jupiter, L.R. [1924] P.D. 30, 32-35; The Gagara, L.R. [1919] P.D. 95, 99-104. The United Kingdom currently follows the theory of absolute sovereign immunity, although the English courts seem to be inclining towards the restrictive theory of immunity. *See generally* Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 AM. J. INT'L L. 423 (1977); White, *State Immunity and International Law in English Courts*, 26 INT'L & COMP. L.Q. 674 (1977).

[81] 639 F.2d at 881; 489 F. Supp. at 532.

[82] *See* text accompanying notes 46-64 *supra*. The *Ruggiero* court held that section 1330 of the Act operated exclusively of both federal diversity jurisdiction under section 1332 and federal question jurisdiction under section 1331. *See* 639 F.2d at 876; note 26 *supra*. The *Ruggiero* court noted that Congress had no reason to allow a plaintiff a jury trial if he sued a foreign state for an alleged violation of a law of the United States, but not otherwise. 639 F.2d at 876.

[83] *See* text accompanying notes 65-72 *supra*. Two courts have interpreted the Act to require bifurcated trials, with the court determining issues of sovereign immunity, and the jury determining issues of liability and damages. *See* Houston v. Murmansk Shipping Co., 87 F.R.D. 71, 73 (D. Md. 1980); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 396 (D. Del. 1978). Such an interpretation may avoid the constitutional issue whether the Act's

the seventh amendment.[84] *Williams* and *Ruggiero* implement the Act in a manner which promotes comity by assuring foreign governments that the corporations they own or operate will receive objective treatment in United States courts.[85]

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denial of trial by jury violates the seventh amendment. *See* Dellapena, *supra* note 4, at 501. Moreover, the bifurcated trial would not harm uniformity of decision in the resolution of issues of sovereign immunity. *Id.*; *see* text accompanying note 17 *supra*. Nevertheless, the bifurcated trial solution is unacceptable because it could harm international comity by subjecting foreign governments and their commercial corporations to trial by jury. *See* text accompanying notes 65-71 *supra*.

[84] *See* text accompanying notes 73-81 *supra*.

[85] *See* text accompanying notes 65-72 *supra*.