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Williams v. Shipping Corp. of India and Rex v. Cia. Pervana de Vapores, S.A.: The Seventh Amendment and the Foreign Sovereign Immunities Act of 1976

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NOTE

Williams v. Shipping Corp. of India and *Rex v. Cia. Pervana de Vapores, S.A.*: The Seventh Amendment and the Foreign Sovereign Immunities Act of 1976

INTRODUCTION

Suits against foreign sovereigns and their agents or instrumentalities are being brought in increasing numbers by American citizens and businesses in United States courts to resolve legal disputes, both at the federal and state levels. Although formerly absolutely prohibited,[1] suits against foreign sovereigns acting in various commercial and business capacities have been allowed in the United States since the 1940s.[2] In response to both the multitude of foreign policy and legal problems, and the general confusion arising out of the attempts by the executive and judicial branches of government to decide when foreign sovereign immunity should be granted in United States courts,[3] Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA).[4] The FSIA

[1] Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (Italian government owned and operated commercial ship held immune from suit in an American court); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) (French naval vessel held immune from suit in an American court). For a more detailed discussion of these cases, see *infra* text accompanying notes 14-18.

[2] Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex Parte* Republic of Peru, 318 U.S. 578 (1943). For a more detailed discussion of these developments, see *infra* notes 14-19 and accompanying text.

[3] For a more detailed discussion of the development of this problem, see *infra* notes 20-34 and accompanying text.

[4] 28 U.S.C. §§ 1330, 1332, 1441, 1602-1611 (1976).

codified what is commonly called the "restrictive" theory of foreign sovereign immunity, which allows American plaintiffs to bring suit against foreign sovereigns acting in a commercial or business capacity.[5]

The FSIA grants federal district courts original jurisdiction in "any nonjury civil action"[6] brought by American plaintiffs against "foreign states."[7] In addition, the FSIA allows a foreign state as defendant to remove any action brought against it in a state court to the proper federal district court.[8] As a result, virtually all suits brought against "foreign states" as defined in the FSIA will be tried in a nonjury rather than a jury trial.[9]

Williams v. Shipping Corp. of India[10] and *Rex v. Cia. Pervana de Vapores, S.A.*[11] are two recent cases brought under the FSIA in which American plaintiffs challenge the propriety of the denial of jury trials. Both claims are based on the Seventh Amendment to the Constitution of the United States, which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United

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5 The "restrictive" theory has replaced the "absolute" theory of foreign sovereign immunity, which prohibited all suits against foreign sovereigns in any capacity. For a discussion of this change in approach, see *infra* notes 14-34 and accompanying text.

6 28 U.S.C. § 1330(a) (1976). This section reads:

(a) 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.

7 28 U.S.C. § 1603(a)-(b) (1976). These subsections read:

For the 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 an 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.

8 28 U.S.C. § 1441(d) (1976). This section reads:

(d) 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 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 a jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

9 However, diversity jurisdiction, and thus jury trial, is allowed where the foreign state is plaintiff. 28 U.S.C. § 1332(a)(4) (1976).

10 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

11 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982).

States, than according to the rules of common law.[12]

Both the Third and Fourth Circuits found no violation of the Seventh Amendment, although through slightly different analyses.[13]

This note will examine the contributions and implications of these decisions for nonjury civil actions brought under the FSIA, and consider the potential impact of the present conflict on judicial interpretation of the Seventh Amendment.

First, the history and development of the two main approaches to foreign sovereign immunity will be examined. Second, the facts and rationales of the *Williams* and *Rex* opinions will be outlined in this context. Third, this note will address the question of whether consideration of the constitutionality of the FSIA can be avoided by statutory construction. Fourth, since the Seventh Amendment issue must be confronted, the *Williams* and *Rex* decisions will be measured against the Supreme Court's recent Seventh Amendment decisions. Finally, alternative approaches to Seventh Amendment analysis and the foreign policy implications of nonjury trials under the FSIA will be reviewed in an attempt both to unify Seventh Amendment theory and find a legal approach for use by the courts which is consistent with United States foreign policy needs.

History of Foreign Sovereign Immunity in the United States

The principle of absolute immunity of foreign sovereigns from suit in the United States developed early in United States law. Clearly articulated for the first time by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*,[14] the concept was based upon the need to respect the dignity of and maintain courtesy to individual foreign nations. As Chief Justice Marshall explained:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice . . . of that absolute and complete jurisdiction within their respective territories which sovereignty confers.
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> This full and absolute territorial jurisdiction being alike the attribute of every sovereign . . . would not seem to contemplate foreign sovereigns

12 U.S. Const. amend. VII.

13 *See infra* text accompanying notes 35-47.

14 11 U.S. (7 Cranch) 116 (1812).

nor their sovereign rights as its objects.[15]

Although the controversy in *The Schooner Exchange* resulted in the establishment of immunity only for military vessels,[16] the Supreme Court did directly apply the principles of absolute sovereign immunity to commercial vessels owned by a foreign sovereign in 1926 in *Berizzi Bros. Co. v. S.S. Pesaro*.[17] The Court there stated that it thought a distinction in treatment for military vessels was not a viable one, because protecting the economic advancement of the nation is as much a proper government function as is the operation of a naval force.[18]

Over time, however, courts began to acknowledge the potential foreign policy complications that might arise out of granting or denying immunity to foreign sovereigns from suits for liabilities relating to their commercial transactions. By the 1940s, the Supreme Court moved away from treatment of foreign sovereign immunity as solely a question of international law, and adopted an approach which began considering its various political implications. To this end, the Court recognized the need to consider political concerns, in the form of recommendations from the executive branch, in deciding whether to grant or deny immunity to foreign nations.[19]

Shortly thereafter, the State Department formally rejected the absolute view of sovereign immunity and adopted the "restrictive" theory of sovereign immunity in the "Tate Letter."[20] The State Department document recognized immunity from suit for sovereigns in cases involving their public acts (*jure imperii*), but not for private or commercial acts by foreign states or entities which they control (*jure gestionis*). Under this policy, a judicial decision on the issue of immunity for a foreign sovereign depended, in large part, on whether a recommendation was made by the State Department.[21]

Unfortunately, the distinction between *jure imperii* and *jure ges-*

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15 *Id.* at 136-37.

16 *Id.* at 135.

17 271 U.S. 562 (1926).

18 *Id.* at 574.

19 Mexico v. Hoffman, 324 U.S. 30 (1945) (In denying sovereign immunity to a vessel owned by the Mexican government but operated by a private corporation, the Court stated: "it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Id.* at 35.); *Ex Parte* Republic of Peru, 318 U.S. 578 (1943) ("[C]ourts are required to accept and follow the executive determination that the [Peruvian-owned] vessel is immune." *Id.* at 588.).

20 Letter from Jack B. Tate, Acting Legal Adviser, State Department, to the Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976).

21 *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.S. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 94th

tionis was not easy to apply in actual cases. Some standards were articulated in response to this problem,[22] but differentiating between the two categories remained problematic.[23]

In response to the confusion in the courts and the need for a consistent policy toward the foreign sovereign immunity question, Congress passed the Foreign Sovereign Immunities Act of 1976.[24] The FSIA codified the restrictive theory of immunity, which has been adopted "[i]n virtually every country."[25] In addition, the Act was intended to follow the lead of almost every other nation in the world by making sovereign immunity "a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs."[26]

According to the House Report on the FSIA, the Act was seen as serving four main objectives. First, the Act codified the "restrictive" approach to sovereign immunity.[27] Second, the FSIA would ensure that immunity decisions in the courts are made on legal grounds, using due process.[28] Third, the Act established procedures for serving pro-

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Cong., 2d Sess. 26 (1976) (statement of Monroe Leigh, Legal Adviser, State Department) [hereinafter cited as *Hearings on H.S. 11315*].

22 *See, e.g.*, Victory Transport v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (*Jure imperii* was held to be limited to these five categories: "(1) internal administrative acts, such as explusion of an alien [;] (2) legislative acts, such as nationalization [;] (3) acts concerning the armed forces [;] (4) acts concerning diplomatic activity [;] (5) public loans.").

23 The confusion in determining what is a commercial activity of a foreign sovereign remains even under the FSIA. *See generally* Comment, *Suing a Foreign Sovereign Government Under the United States Antitrust Laws: The Need for Clarification of the Commercial Activity Exception to the Foreign Sovereign Immunities Act of 1976*, 1 NW. J. INT'L L. & BUS. 657 (1979).

24 28 U.S.C. §§ 1330, 1332, 1441, 1602-1611 (1976).

Congress saw application of the "Tate Letter" policy as having two main problems. First, the adoption of the restrictive theory of sovereign immunity in that document puts the State Department "in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts." Second, bringing the matter up for State Department review leaves the initiative for review to the foreign state. Together, these considerations leave the private litigant in considerable doubt as to whether his suit will be allowed to stand. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1, 8-9, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606-07.

25 *Id.* at 9, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6608.

26 *Hearings on H.S. 11315*, *supra* note 21, at 26-27. *See also* Martropico Compania Naviera, S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), 428 F. Supp. 1035, 1037 (S.D.N.Y. 1977) (In holding that the FSIA's removal provisions do not apply to actions pending on the Act's effective date, the court explained that the FSIA provides a "unitary rule" for addressing questions of sovereign immunity, eliminating the role of the State Department and thereby conforming with almost every other nation's practice.).

27 H.R. REP. No. 1487, *supra* note 24, at 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605.

28 *Id.* at 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605-06.

cess on and getting jurisdiction over a foreign state.[29] Finally, the bill provided a means by which creditors could enforce final judgments.[30]

The House Report on the FSIA briefly mentions the rationale for providing only for nonjury trials under the Act. Jury trials are excluded in actions against foreign states[31] because "[a]ctions tried by a court without a jury will tend to promote uniformity in decision where foreign governments are involved."[32] In addition, a foreign state as a defendant has the option of removing an action brought against it in state court to a federal district court.[33] The purpose of such removal is to increase the potential for consistent treatment of foreign states in American courts. To this end, any demand for a jury trial made by a plaintiff in a state court will be extinguished by removal to a district court.[34]

THE *WILLIAMS* AND *REX* DECISIONS

Both *Williams* and *Rex* are tort actions brought by American longshoremen injured while working on ships owned by the defendant corporations, the Shipping Corp. of India and Cia. Pervana de Vapores, S.A. Both defendant corporations are wholly owned by their governments, India and Peru, respectively.[35]

In *Williams*, the plaintiff filed suit in a Virginia state court. The defendant corporation removed the suit to the District Court of the Eastern District of Virginia, and moved to strike plaintiff's jury trial demand on the basis of section 1441(d) of the FSIA. The district court granted the motion to strike, holding that jurisdiction was based solely on section 1441(d), and could not be based on diversity jurisdiction. Additionally, the district court found no violation of the plaintiff's right to jury trial.[36]

The Fourth Circuit affirmed the ruling of the district court. Dismissing any possibility that jurisdiction over the foreign defendant

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29 *Id.* at 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6606.

30 *Id.*

31 28 U.S.C. § 1330(a) (1976).

32 H.R. REP. No. 1487, *supra* note 24, at 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6611-12.

33 28 U.S.C. § 1441(d) (1976).

34 H.R. REP. No. 1487, *supra* note 24, at 32-33, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6631-32.

35 Williams v. Shipping Corp. of India, 653 F.2d 875, 876-77 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 62 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982).

36 Williams v. Shipping Corp. of India, 489 F. Supp. 526 (E.D. Va. 1980), *aff'd*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

could be had under the diversity of citizenship provisions of title 28,[37] the court moved to the Seventh Amendment issue. Adopting a "static" historical approach to the Seventh Amendment articulated by the United States Supreme Court,[38] the court in *Williams* looked to see if the right to a jury trial existed at English common law in 1791 in suits against foreign sovereigns. The *Williams* court held that there was no right to a trial by jury in such suits at common law because suits against foreign sovereigns were not even allowed at common law.[39]

The action brought in *Rex* differs from that in *Williams* in several major respects. The *Rex* action originated in the federal district court under plaintiff's assertion of diversity jurisdiction. Finding the defendant corporation within the class of "citizens or subjects of a foreign state," the district court held that diversity jurisdiction under section 1332(a)(2) allowed the plaintiff a jury trial.[40] The Third Circuit disagreed with this reading of the statute, however, and reversed the district court's ruling allowing a jury trial.[41]

Upon resolution of the question of statutory construction, the Third Circuit proceeded to the plaintiff's contention that forcing his claim to be tried in a bench trial denied him his Seventh Amendment right to a jury trial.[42] On this question, the Third Circuit attempted to pursue a somewhat different line of inquiry than the Fourth Circuit in *Williams*,[43] claiming that the proper approach to the question was to inquire whether the plaintiff's action "is in the nature of a legal remedy similar to a suit at common law."[44] In spite of its use of this more elastic test,[45] the *Rex* court concluded, as did the *Williams* court, that actions against foreign sovereigns did not exist at common law.

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37 28 U.S.C. § 1332 (1976). For further discussion of this point, see *infra* notes 48-78 and accompanying text.

38 Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935); Dimick v. Scheidt, 293 U.S. 474 (1935). For further discussion, see *infra* text accompanying notes 83-88.

39 Williams v. Shipping Corp. of India, 653 F.2d at 881-82.

40 Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982).

41 *Rex*, 660 F.2d at 64-65. For further discussion of this issue, see *infra* text accompanying notes 48-78.

42 *Rex*, 660 F.2d at 65.

43 For a discussion of the apparent "differences" in the approaches taken by the Third and Fourth Circuits, see *infra* notes 100-07 and accompanying text.

44 *Rex*, 660 F.2d at 67. On the other hand, the Fourth Circuit specifically rejects the type of approach used by the Third Circuit: "To invoke the Amendment, it is not enough that the nature of the plaintiff's action is 'legal' rather than maritime or equitable; the action must also be brought against a defendant who was suable at common law in 1791." *Williams*, 653 F.2d at 883.

45 The development of the "elastic" approach to the Seventh Amendment is discussed *infra* in notes 89-99 and accompanying text.

Rather, the *Rex* opinion noted that until the passage of the FSIA in 1976, determination of validity of suits against foreign sovereigns had been within the discretion of the executive branch.[46] Thus, as in *Williams*, the *Rex* court held that since the action in that case did not fall within the ambit of the Seventh Amendment, jury trial was not constitutionally mandated.[47]

Statutory Construction of Jurisdictional Provisions

In an effort to avoid confronting the Seventh Amendment jury trial issue in cases challenging the validity of the FSIA, a number of courts have engaged in contorted readings of the provisions of the FSIA and section 1332,[48] thereby clearly contradicting the intent of the authors of the FSIA.[49] It is a well-established principle of statutory interpretation that statutes be read to avoid the creation of constitutional issues and be accorded a presumption of constitutionality.[50] Thus, the provisions of the FSIA at issue should not be invalidated without a clear showing of unconstitutionality.[51]

Prior to the passage of the Foreign Sovereign Immunities Act, corporations formed under the laws of foreign states were considered for purposes of diversity jurisdiction as "citizens or subjects of a foreign state."[52] Thus, until the passage of the FSIA in 1976, any suit brought against such a corporation in federal court was based on sections 1332(a)(2) and (3), which included the class of "foreign states or citizens or subjects thereof."[53] However, the amendments to section 1332, passed with the FSIA in 1976,[54] have given rise to two interpretations

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46 *Rex*, 660 F.2d at 68.

47 *Id.* at 69. See *infra* text accompanying notes 100-07 for commentary on the *Rex* decision.

48 *See* cases cited *infra* notes 55-56.

49 *See infra* text accompanying notes 60-64.

50 Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448-49 (1830).

51 Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 65 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982).

52 Steamship Co. v. Tugman, 106 U.S. 118 (1882).

53 28 U.S.C. § 1332 (pre-FSIA):

> (a) 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.

54 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891, 2891 (1976).

of the statutory language and, thus, two potential bases for jurisdiction over foreign sovereign-owned corporations.

Some courts, including the district court in *Rex*,[55] have held that diversity jurisdiction over foreign sovereign-owned corporations can still be obtained under the provisions of section 1332.[56] Other courts, including the circuit courts in *Rex*[57] and *Williams*,[58] have rejected this view,[59] asserting that federal district courts can only obtain jurisdiction over these corporations through section 1330 of the FSIA.[60] According to the latter view, foreign sovereign-owned corporations can be included only in the FSIA's definition of "foreign state."[61] Thus, these corporations cannot be properly included in the class of "citizens or subjects of a foreign state" covered by the new language of section 1332. This position is strongly supported by the fact that Congress removed the term "foreign state" from section 1332 when it passed section 1330, limiting diversity jurisdiction to only the narrowed class of "citizens or subjects of a foreign state."[62]

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55 Rex v. Cia. Pervana de Vapores, S.A., 493 F. Supp. 459, 466-67 (E.D. Pa. 1980), *rev'd*, 660 F.2d 61, 63-65 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982).

56 Houston v. Murmansk Shipping Co., 87 F.R.D. 71 (D. Md. 1980), *rev'd*, 667 F.2d 1151 (4th Cir. 1982) (The district court denied defendant corporation's motion to strike jury demand, stating that jurisdiction under section 1332 was proper. The Fourth Circuit reversed and remanded, stating that section 1330(a) and section 1441(d) (removal provision) are the only routes to jurisdiction over the defendant, and that the jury demand should have been denied.); Lonon v. Companhia De Navegacao Lloyd Basileiro, 85 F.R.D. 71 (E.D. Pa. 1979) (FSIA held not to preclude diversity jurisdiction and concomitant jury trial).

57 660 F.2d at 63-65.

58 Williams v. Shipping Corp. of India, 653 F.2d 875, 881 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

59 *See, e.g.*, Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 875-76 (2d Cir. 1981) (Held that: (1) federal court jurisdiction over a foreign state or agency or instrumentality thereof must be based on section 1330(a), which provides for nonjury trials, and (2) denial of jury trials to plaintiff longshoremen did not, under the "static" approach, violate the Seventh Amendment); Jones v. Shipping Corp. of India, 491 F. Supp. 1260 (E.D. Va. 1980) (Held that jurisdiction over foreign sovereign-owned corporations is obtainable only under section 1330, which requires nonjury trials). *Cf.* Goar v. Compania Peruana de Vapores, 688 F.2d 417, 428 (5th Cir. 1982) (Held that plaintiff had no right to jury trial, but refused to decide whether section 1330(a) provides the sole basis for jurisdiction).

60 For the text of section 1330(a), see *supra* note 6.

61 For the text of this definition, see *supra* note 7.

62 28 U.S.C. § 1332 (1976) (with FSIA amendments). This section reads:

(a) 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 citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Deciding whether a suit is based on section 1332 or 1330 is critical to any determination of whether a jury trial is to be allowed, for the diversity jurisdiction provisions of section 1332[63] traditionally have been read to require jury trials, while the original jurisdiction provision of section 1330 provides for only nonjury trials.[64]

In an early interpretation of the FSIA, the District Court for the District of Columbia held in *Icenogle v. Olympic Airways, S.A.*[65] that jurisdiction over the defendant airline, a corporation wholly-owned by the government of Greece, could properly be based on diversity jurisdiction provisions of section 1332, rather than on section 1330 of the FSIA. In particular, the *Icenogle* court asserted that the FSIA created a choice between these two approaches to obtaining jurisdiction.[66]

In order to bring the defendant airline under section 1332, the *Icenogle* court held that although the airline could be a "foreign state" under section 1330(a) of the FSIA,[67] it could also be held to be in the section 1332(a)(2) and (3) class of "citizens or subjects of a foreign state."[68] If held to be within this latter definition, the defendant could be reached for suit through diversity jurisdiction under subsections 1332(a)(2) or (3), and a jury trial would be required.[69]

This rationale, which was also used by the district court in *Rex*,[70] has been criticized by a number of commentators,[71] as well as the Second[72] and Third[73] Circuits.

The Second and Third Circuits' reading of the FSIA is not only logically based on the language of the Act,[74] but also follows one of the main purposes for the Foreign Sovereign Immunities Act: to ensure consistency of decision-making[75] and reduce uncertainty about proce-

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63 *See supra* notes 53 and 62.

64 For the text of section 1330(a), see *supra* note 6.

65 82 F.R.D. 36 (D.D.C. 1979).

66 *Id.* at 38. This position of the *Icenogle* court was recently urged by the petitioner in *Williams* in his request for review by the United States Supreme Court. Petitioner's Brief for Certiorari at 29-32.

67 *See supra* note 7.

68 *Icenogle*, 82 F.R.D. at 38-40.

69 *Id.*

70 *Rex*, 493 F. Supp. at 466-68.

71 *See, e.g.*, Note, *Sovereign Immunity: Jury Trial*, 28 HARV. INT'L L.J. 720 (1979); Brief for Appellees at 6-15, Goar v. Compania Peruana de Vapores, 688 F.2d 417 (5th Cir. 1982).

72 Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 875-76 (2d Cir. 1981).

73 *Rex*, 660 F.2d at 63-65.

74 Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 877 (2d Cir. 1981); *Williams*, 653 F.2d at 880.

75 "Actions tried by a court without jury will tend to promote a uniformity in decision where

dural questions in suits involving foreign states.[76] Uncertainty in interpretation on the issue would be eliminated if Congress amended sections 1331(a)(2) and (3) to clearly state that the phrase "citizens and subjects of a foreign state" no longer includes "foreign state" as defined in section 1603(a).

If the approach of the *Icenogle* court was a valid one, there would be an opportunity for American plaintiffs to bring suit based on diversity jurisdiction against these foreign states and corporations, and thereby obtain a jury trial. However, since most courts and commentators agree that diversity jurisdiction and, thus, jury trials cannot be had in suits against foreign states under the FSIA,[77] the constitutional issue of the Seventh Amendment right to jury trial under the FSIA must be met directly by the courts.[78]

APPLYING THE SEVENTH AMENDMENT TO THE FSIA

In determining whether a right to trial by jury exists under the Seventh Amendment, the initial inquiry must be whether the suit in question falls within the class of "suits at common law." The earliest Supreme Court decisions on this point explained the phrase by drawing a line between suits "at law" and suits "in equity":

> The phrase "common law," found in this clause [of the Seventh Amendment], is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene. . . . By *common law*, they [the framers of the amendment] meant . . . 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. . . .[79]

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foreign governments are involved." H.R. REP. NO. 1487, *supra* note 24, at 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6611-12.

76 "At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state." *Id.* at 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6611-12.

In its brief to the Fourth Circuit, the defendant Shipping Corp. of India pointed out an inconsistency in the *Icenogle* approach in the context of section 1441(d) (28 U.S.C. § 1441(d) (1976)), which provides for removal of these actions from state to federal court for nonjury trials. The brief asserts that it would be illogical for Congress to forbid jury trials in removal cases while allowing jury trials in cases of original jurisdiction. Brief for Appellee at 8, *Williams*. This position was adopted by the Fourth Circuit, which stated: "We find such a bifurcated analysis of the jurisdictional sections of the Act to be unwarranted." *Williams*, 653 F.2d at 880 n.4.

77 Except under section 1332(a)(4), which allows diversity jurisdiction in suits where the foreign state is plaintiff. 28 U.S.C. § 1332(a)(4) (1976).

78 Note that the dissenting judge in *Rex* disagreed with the majority on the Seventh Amendment issue, not this statutory construction issue. 660 F.2d at 69-70 (Sloviter, J., dissenting).

79 Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830) (emphasis by the Court). Attempts

In determining whether an action involves such a legal right, "resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."[80] It is generally agreed that the rules of the common law to be used are those of England, rather than of the states.[81] If a legal right is found, the right to a jury trial, with all of its fundamental elements, must be provided.[82]

Since the passage of the Seventh Amendment in 1791, however, the Supreme Court has developed two approaches to the problem of whether a jury trial should be required in a particular case.

The Fourth Circuit in *Williams* adopted the historical approach to determining Seventh Amendment challenges in what is commonly referred to as a "static" form.[83] Under this analysis, which has not been used by the Supreme Court in any recent Seventh Amendment cases,[84] the court looks only to see if the action in question in a particular case existed under the English common law in 1791. If so, then a right to jury trial is granted. If not, then there is no Seventh Amendment problem, and the challenge is unsuccessful.[85]

In applying this static historical test to the FSIA, the *Williams* court looked to the opinions of the Supreme Court in *The Schooner Exchange v. M'Faddon*[86] and *Berizzi Bros. Co. v. S.S. Pesaro*.[87] The Fourth Circuit decided that since the latter cases already held that suits against foreign sovereigns could not be brought in England at the time of the Seventh Amendment's passage, it was clear that an action like the one brought by the plaintiff in *Williams* could not have been brought under the English common law in 1791, and thus no right to a jury trial existed.[88]

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at historical analysis of the intent of the framers of the Seventh Amendment can be found in Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973), and in Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

80 Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

81 Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

82 Galloway v. United States, 319 U.S. 372 (1943).

83 Williams v. Shipping Corp. of India, 653 F.2d 875, 881 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). The "static" approach is also used by the Second Circuit in Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 879 (2d Cir. 1981). The second, or "elastic," approach used by the Third Circuit in *Rex*, is discussed *infra* in the text accompanying notes 89-106.

84 Two of the most recent uses of the "static" analysis include Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935), and Dimick v. Schiedt, 293 U.S. 476 (1935).

85 *See Williams*, 653 F.2d at 881-82.

86 11 U.S. (7 Cranch) 116 (1812).

87 271 U.S. 562 (1926).

88 *Williams*, 653 F.2d at 881-82.

In recent years, however, the Supreme Court has abandoned the "static" approach to the Seventh Amendment for a more flexible, or "elastic," approach.[89] As a result of the practice of trying both legal and equitable issues together in the federal courts, the Court held in 1959 that courts trying mixed cases of law and equity should exercise discretion to preserve jury trial wherever possible.[90] The Court in *Beacon Theatres v. Westover*[91] not only felt compelled to follow the Seventh Amendment's jury trial command, but also found echoes of the Seventh Amendment mandate in Congress' intent to preserve the right to jury trial as "inviolate."[92]

Subsequent decisions of the Court clarified the need for a more expansive interpretation of the Seventh Amendment, thus including suits not allowed at common law in 1791, but still "in the nature of" suits which were allowed at the time.[93] In *Dairy Queen, Inc. v. Wood*,[94] the Court held that the plaintiff trademark owners' claim for money damages based on a material breach of contract was an action "wholly legal in nature" and thus subject to the Seventh Amendment's jury trial provision.[95] In *Curtis v. Loether*,[96] an action brought under the fair housing provisions of title VIII of the Civil Rights Act of 1968 was held to require a trial by jury. The Court stated:

> [W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.[97]

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89 The elastic approach looks at whether the suit is one "in the nature of" an action at common law. For a discussion of this elastic approach, see *infra* notes 93-99.

90 Beacon Theatres v. Westover, 359 U.S. 500, 510 (1959).

91 *Id.*

92 FED. R. CIV. P. 38(a).

93 This elastic test is adopted by the Third Circuit in Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 66-67 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982). *See infra* note 100 and accompanying text.

94 369 U.S. 469 (1962).

95 *Id.* at 477.

96 415 U.S. 189 (1974).

97 *Id.* at 195. The Court distinguished proceedings like the one in *Curtis*, which was to be brought in district court, from cases involving administrative proceedings where the right to trial by jury was denied, including Katchen v. Landy, 382 U.S. 323 (1966), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The *Curtis* Court stated that "the Seventh Amendment is generally inapplicable in administrative proceedings." 415 U.S. 189, 194 (1974). The Court's decision in Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977), denying jury trials in hearings involving safety violations under the Occupational Safety and Health Act of 1970, would also fall into this group of administrative cases not covered by the Seventh Amendment.

The Court's decision in *Pernell v. Southall Realty*[98] supported the *Curtis* result. In *Pernell*, the Court held that an action to recover possession of real property under the District of Columbia Code also involved "rights and remedies of the sort traditionally enforced in an action at law."[99]

Consonant with these recent decisions of the Supreme Court, the Third Circuit in *Rex* elected to adopt the elastic approach to the Seventh Amendment, focusing on the remedy requested by the plaintiff: "the proper inquiry is . . . whether his action is in the nature of a legal remedy similar to a suit at common law."[100] After stating this test, however, the *Rex* court shifted to an analysis like the one used in *Williams*, focusing on the nature of the defendants involved rather than on the nature of the remedy sought.[101] The court looked at the history of foreign sovereign immunity and concluded, as did the Fourth Circuit in *Williams*, that "[h]istory thus conclusively demonstrates that actions against foreign sovereigns have never existed at common law."[102] The *Rex* court explained that the right to bring such suits "has existed always and exclusively at the sufferance of the United States Department of State."[103] As a result, the Third Circuit held that the denial of a jury trial in actions against foreign sovereign-owned corporations is not a violation of the Seventh Amendment.[104]

If the Third Circuit had followed the elastic test it initially articulated, however, the outcome would necessarily be different. The action in *Rex* is one seeking money damages under the Longshoremen's and Harbor Workers' Compensation Act.[105] Under *Dairy Queen* and *Curtis*, actions for money damages are clearly legal in nature, and thus require a jury trial.[106] Thus, applying the Supreme Court's elastic ap-

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98 416 U.S. 363 (1974).

99 *Id.* at 375.

100 Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 67 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1971 (1982). The Third Circuit stated:

> Appellant argues, and the second and fourth circuits agree, that the seventh amendment protects only actions recognized at common law in 1791. We do not accept this static approach to a vital constitutional guarantee. . . . We must decide whether Rex's claim is a "Suit at common law," but we do not view common law as frozen in 1791.

Id. at 66.

101 *Id.* at 70 (Sloviter, J., dissenting).

102 *Id.* at 68.

103 *Id.*

104 *Id.* at 69.

105 33 U.S.C. § 905(b) (1976).

106 Curtis v. Loether, 415 U.S. 189, 195-96 (1974); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962). For a discussion of these cases, see *supra* text accompanying notes 94-97.

proach, the *Rex* suit is also legal in nature, and should require a jury trial.

The *Rex* court's extensive discussion of congressional policy concerns underlying the decision to provide only nonjury trials under the FSIA[107] suggests that the Third Circuit side-stepped the elastic test's inevitable result in order to uphold Congress' policy decision that jury trials in suits against foreign states are undesirable. Indeed, the foreign policy considerations referred to, both by the courts and Congress, in the approval of nonjury trials against foreign states are quite persuasive.

Congress thought that by providing only nonjury trials under the FSIA, the uniformity in decisions involving governments would be increased.[108] The *Rex* court agreed that this increased uniformity in decision-making would encourage foreign states to cooperate more fully with the judicial processes of the United States.[109] Both *Rex* and *Ruggiero* suggest that foreign states operating within civil law systems will neither understand nor trust the common law jury system[110] and, thus, would be unwilling to cooperate with it. According to Judge Friendly in *Ruggiero*: "Whatever our enthusiasm over the jury may be, this is not necessarily shared by foreign governments—particularly those which may fear that at one time or another they may be politically unpopular with Americans."[111] Thus, the provision of only nonjury trial actions may alleviate a foreign state's fears of prejudice and reprisal.

Also important to Congress and the courts are notions of comity and respect among nations. Actions brought against the United States government can only be tried without a jury,[112] and, thus, comity requires that no other sovereign be forced to submit to procedures to which even the host government is not subject.[113]

Finally, the *Rex* court noted that it was inconsistent to state that Congress has the power to take the large step of entirely removing a foreign state's immunity from suit, but does not have the option of sim-

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107 *Rex*, 660 F.2d at 67-69.

108 H.R. REP. No. 1487, *supra* note 24, at 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6611-12.

109 *Rex*, 660 F.2d at 69.

110 *Id.*; Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 880 (2d Cir. 1981).

111 *Ruggiero*, 639 F.2d at 880 n.12.

112 28 U.S.C. § 2402 (1976).

113 H.R. REP. No. 1487, *supra* note 24, at 13, *reprinted in* U.S. CODE CONG. & AD. NEWS at 6611-12; *Rex*, 660 F.2d at 67; *Ruggiero*, 639 F.2d at 880.

ply modifying that immunity by providing exclusively nonjury suits. Forcing a choice between jury trials in every case and the total inability to sue foreign sovereign-owned corporations "would pose a Hobson's choice for Congress and ultimately work to the detriment of injured plaintiffs."[114]

In *Williams*, the defendant corporation argued that the benefit of uniformity of decisions was a "functional justification" for denying the right to jury trial under the rationale of *Curtis v. Loether*.[115] This position was not accepted by the Fourth Circuit, however. It is apparent from an examination of the rest of the *Curtis* opinion that a "functional justification" for denying trial by jury exists only when the statutory scheme would be substantially harmed by the forced use of juries in the adjudicative process.[116] Such functional justifications are not present when Congress provides for trial in the district courts, although such a justification may be present in a variety of administrative proceedings, or in specialized tribunals like the bankruptcy court.[117] This also suggests that the other foreign policy considerations found by Congress and the courts also would not fall within the "functional justification" language of *Curtis*.

Thus, although there are a number of strong foreign policy arguments favoring the establishment of nonjury trials in suits against foreign states brought under the FSIA, the elastic approach to the Seventh Amendment clearly requires jury trials in such situations. The petitioner in *Rex* found support for this position in *Reid v. Covert*,[118] which upheld the Sixth Amendment right to trial by jury in criminal cases when civilians were tried by court-martial overseas:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are

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114 *Rex*, 660 F.2d at 69; Brief for Appellee at 12, Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981).

115 Brief for Appellee at 11, Williams v. Shipping Corp of India, 653 F.2d 875 (4th Cir. 1981). *See also* quotation from Curtis v. Loether, 415 U.S. 189, 195 (1974), reproduced *supra* in text accompanying note 97.

116 Curtis v. Loether, 415 U.S. 189, 195 (1974).

117 *Id.* This rationale is more fully discussed *supra* in note 97. *See also infra* note 121.

118 354 U.S. 1 (1957).

not there.[119]

If the Supreme Court wants to uphold the nonjury trial provisions of the FSIA, if challenged in that Court, several alternative approaches other than constitutional amendment can be taken.

First, the Court could apply the "functional justification" to actions brought against foreign states in the district courts.[120] This approach would be based on the idea that the foreign policy implications of trials by jury against foreign sovereign-owned defendants would severely undermine the effectiveness of the FSIA in obtaining jurisdiction over these defendants. However, the strong language of the Supreme Court in *Curtis v. Loether* indicates that the finding of any such functional justification in district court proceedings is not likely.[121] In addition, the allowance of a functional justification of nonjury trials involving foreign states at the district court level might cause other courts to find analogous justifications to deny jury trials in other types of civil suits, thereby eroding the basic guarantee of the right to a trial by jury.

Second, the Court could hold that the passage of the FSIA adds a third class to the traditional denominations of suits as either federal question cases or diversity cases: a *sui generis* class of actions against foreign states.[122] This class of cases, since it was unknown at common law, could be held to be outside the scope of the Seventh Amendment and exempt from the jury trial requirement.[123] Thus, the Congressional decision to eliminate trial by jury under the FSIA would be proper. The advantage to this approach is that it limits the ability of both the courts and Congress to create exceptions to the Seventh Amendment right to trial by jury in other types of civil actions, because is singles out only one new class of cases for unique treatment.

Third, the elastic approach could be abandoned and replaced by the more rigid static approach used by the Fourth Circuit in *Williams*.[124] This option would leave to Congress the determination of

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119 *Id.* at 14, *quoted in* Petition for Writ of Certiorari at 29-30, Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981).

120 *See supra* notes 97, 115-17 and accompanying text.

121 The Court stated:

> when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

415 U.S. 189, 195 (1974).

122 Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 876 (2d Cir. 1981).

123 *Id.* at 881.

124 *Williams*, 653 F.2d at 881-82.

whether a jury trial is required in any classes of actions created after the Seventh Amendment's passage in 1791.[125] Although this approach allows Congress to consider the foreign policy implications of jury trials in the enactment of the nonjury trial provisions of the FSIA, the elastic approach will ultimately leave Congress with new authority to deny jury trials in a variety of other types of civil cases. At the same time, such an approach would limit the opportunity for judicial review of the denial of jury trials. It seems unlikely that the Supreme Court would choose to so restrict its own authority in this area.

Thus, the best approach to resolving the constitutional conflict would be to declare actions against foreign states to be a class *sui generis*, thereby making such actions exempt from the jury trial requirement.

CONCLUSION

The attention of Congress to the growing problem of legal dispute resolution between American citizens and businesses and foreign sovereign-owned corporations resulted in the passage of the Foreign Sovereign Immunities Act in 1976. Although the Act codifies a unified approach to the immunity issue and, thus, greatly improves the processes by which foreign sovereign-owned corporations can sue and be sued in United States courts, judicial interpretation of the Act's provision creating nonjury trials when these corporations are defendants has only created additional confusion for those searching for a consistent approach to Seventh Amendment cases.

Several solutions to the problems raised by litigants in this area can be posed. First, Congress should clarify sections 1332(a)(2) and (3) by explaining that the phrase "citizens or subjects of a foreign state" does not include foreign states as defined in section 1603(a) of the FSIA. This would forthrightly delineate Congress' intent to subject these foreign states to suit solely through sections 1330 and 1441, which provide only for nonjury trials.

Second, the confusion in decisions made under the Seventh Amendment must be clarified. The *Williams* court's attempt to ignore cases requiring the use of the elastic approach, and the *Rex* court's misuse of the elastic standard, clearly indicate that some moves must be made to unify the decisional law in the area. The narrowest and easiest change to implement would be to declare that suits against foreign

125 *See* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. L. REV. 486, 517, 531 (1975).

states are a class of actions *sui generis* and unknown at common law. Thus, jury trials would not be properly required in such cases. In addition, this solution would prevent courts and Congress from randomly chipping away at Seventh Amendment guarantees in other types of civil suits. Without the implementation of this or another change in the existing approach to Seventh Amendment questions, the mandates of the Seventh Amendment in the context of the FSIA will continue to be unclear, and lower court use of this body of law will necessarily lead to inconsistent treatment of parties in cases where Seventh Amendment disputes arise.

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