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Recent Decisions

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RECENT DECISIONS

SOVEREIGN IMMUNITY—THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PRECLUDE JURY TRIALS AGAINST FOREIGN GOVERNMENT-OWNED COMMERCIAL CORPORATIONS

I. FACTS AND HOLDING

Plaintiffs, administrators of two estates,[1] brought a wrongful death action[2] for damages arising out of the crash in Greece[3] of a commercial airliner operated by defendant foreign government-owned corporation.[4] Plaintiffs, claiming diversity jurisdiction,[5] demanded a jury trial as granted by the seventh amendment.[6] Defendant, conceding jurisdiction,[7] moved to strike the demand for a jury trial on the ground that the Foreign Sovereign Immunities

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1. Plaintiffs are the administrators of the estate of a husband and wife, both citizens of Wisconsin, and of the estate of a citizen of New York.

2. The two original actions were consolidated for trial.

3. Decedents were passengers on defendant's plane, owned and operated as a common carrier, when it crashed on a domestic flight between two Greek cities.

4. Defendant's stock is owned by the government of Greece. Defendant operates and has offices in the United States.

5. Plaintiffs based their claim of diversity jurisdiction on 28 U.S.C. § 1332(a)(2) (1976), *as amended by* the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 3, 70 Stat. 289. Section 1332(a) provides:

> 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 interests 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.

6.
> 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 re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

7. Defendant originally contested jurisdiction and venue. It later conceded both and also admitted liability for the accident.

Act forbids jury trials in actions against foreign states.[8] On defendant's motion to strike the demand for jury trial, motion *denied. Held*: The Foreign Sovereign Immunities Act does not preclude the right to trial by jury in actions against foreign government-owned commercial corporations. *Icenogle v. Olympic Airways, S.A.*, No. 77-1982 (D.D.C. March 19, 1979).

II. LEGAL BACKGROUND

The seventh amendment guarantees the right to trial by jury in civil actions previously recognized "at common law."[9] The Framers included the amendment to safeguard against the arbitrary application of the law[10] in suits involving "legal" claims, defined as those capable of satisfaction by an award of monetary damages.[11] Traditionally, however, there is no right to trial by jury against the United States government.[12] Three factors account for this prohibition of jury trials under the two major acts providing for compensation of claims against the Government,[13] the Federal Tort Claims Act of 1946 (FTCA)[14] and the legislation establishing the Court of Claims.[15] First, Congress was concerned with estab-

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8. 28 U.S.C. § 1330(a) (1976) provides:

> 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.

9. U.S. CONST. amend. VII. *See* note 6 *supra*.

10. *See* Galloway v. United States, 319 U.S. 372 (1943) (Black, J., dissenting).

11. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974); Ross v. Bernhard, 396 U.S. 531 (1970); Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830).

12. McElrath v. United States, 102 U.S. 426 (1880). "Any action against the United States under section 1346 shall be tried to the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury." 28 U.S.C. § 2402 (1976).

13. Other procedures for compensation of claims exist. *See, e.g.*, provisions of the Administrative Procedure Act, codified at 5 U.S.C. § 702 (1976).

14. Federal Tort Claims Act of 1946, Pub. L. No. 79-601, 60 Stat. 842 (codified at 28 U.S.C. § 1346 and scattered sections of 28 U.S.C. (1976)).

15. *See* Act of March 3, 1887, Ch. 359, 24 Stat. 505; Act of March 17, 1866, Ch. 19, 14 Stat. 9; Act of March 3, 1863, Ch. 92, 12 Stat. 765; Act of February 24, 1855, Ch. 122, 10 Stat. 612; note 17 *infra*. Statutes governing the Court of Claims are currently codified in 28 U.S.C. §§ 1491-1507 (1976).

lishing procedures through which claims against the government could be handled with greater speed and efficiency. Prior to the establishment of the Court of Claims an aggrieved claimant's sole remedy against the United States was a private congressional relief bill.[16] Between 1855 and 1863, Congress, unable to consider properly a large backlog of private relief bills, created the Court of Claims to hear certain nonjury actions not sounding in tort against the government.[17] Similarly, before the enactment of the FTCA, which confers exclusive jurisdiction upon the federal district courts over civil actions for monetary damages arising out of negligent acts or omissions by government employees,[18] Congress was only capable of handling fifteen to twenty percent of the meritorious relief bills presented to it.[19] Second, Congress desired to ensure uniformity of decision in cases involving the government. To foster the development of a coherent body of government procurement law, Congress vested sole jurisdiction in the Court of Claims over contract suits against the United States with amounts in controversy exceeding $10,000.[20] Concern over the intrusion of political factors into the consideration of private tort relief bills[21] prompted Congress to enact the FTCA to ensure uniformity of decision between claims brought against the Government and suits brought against private defendants. Congress intended to make recovery against the United States a matter of

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16. *See* PROSSER, LAW OF TORTS 971 (4th ed. 1971).

17. Evans, *The United States Court of Claims*, 17 FED. BAR J. 85, 86-87 (1957). The Court of Claims' jurisdiction has been expanded to include "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491 (1976). For a complete history of the Court of Claims, see Richardson, *History, Jurisdiction, and Practice of the Court of Claims of the United States*, 7 SOUTHERN L. REV. (new series) 52; *reprinted in* 17 Ct. Cl. 3 (1882); Hoyt, *Legislative History of the Court of Claims*, in 1 WEST'S CT. CL. DIGEST at xiii (1950).

18 28 U.S.C. § 1346(b) (1976).

19. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 40 (1942) (memorandum for committee use).

20. 28 U.S.C. § 1346(a)(2) (1976) allows the district courts to exercise jurisdiction concurrent with the Court of Claims in contract and certain other actions in which less than $10,000 is in controversy. Evans, *supra* note 17, at 90, 97.

21. *Hearings on H.R. 5373 and H.R. 6463, supra* note 19, at 40.

"justice" rather than of "grace"[22] by holding the sovereign liable "in the same manner and to the same extent as a private individual under like circumstances."[23] Third, Congress feared that juries, swayed by sentiment and the Government's inexhaustible resources, might render excessive verdicts in tort actions against the United States.[24] This apprehension resulted in the restriction of the right to trial by jury against the Government to causes in which damages can be precisely controlled.[25] Theoretical justification for the prohibition of jury trials is found in the absolute theory of sovereign immunity. In *McElrath v. United States*[26] the Supreme Court approved nonjury trials in the Court of Claims by holding that such suits are not controlled by the seventh amendment.[27] The Court reasoned that because the Government could

22. *Tort Claims Against the United States: Hearings on S. 2690 Before A Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 50 (1940).

23. 28 U.S.C. § 2674 (1976).

24. *Tort Claims Against the United States: Hearing on H.R. 7326 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 20 (1940) (statement of A. Holtzoff). *See also* Anderson, *Recovery from the United States under the Federal Tort Claims Act*, 31 MINN. L. REV. 456, 457 (1947).

25. In considering the Act of July 30, 1954, ch. 648, § 2(a), 68 Stat. 589 (codified at 28 U.S.C. § 2402 (1976)), quoted at note 12 *supra*, which permitted taxpayers a greater opportunity to sue in the district courts for recovery of alleged wrongfully collected taxes, Congress struck and then reinstated a provision allowing jury trials. "In either case [whether the tax collector or the government is sued] recovery is limited to the amount of taxes erroneously or illegally collected." Congress wanted to eliminate in suits against a collector the legal fiction that the collector personally paid any judgment against him. This consideration, and the ability to control damages, outweighed any difficulties a jury might have in applying complicated tax laws. H.R. REP. No. 2276, 83d Cong., 2d Sess. 2-3, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2716, 2720-21.

Conversely, the Supreme Court consistently preserved the right to jury trial in actions under statutes such as the Federal Employers' Liability Act, 45 U.S.C. § 51 (1976), which gives injured railroad employees a cause of action against their (private) employers, because of the jury's ability to find liability and damages when a judge would have discerned neither. *See* Bailey v. Central Vermont Railway, Inc., 319 U.S. 350, 358 (1943) (Roberts, J., dissenting): "Finally I cannot concur in the intimation which I think the opinion gives that, as Congress has seen fit not to enact a workman's compensation law, this court will strain the law of negligence to award compensation when the employer is without fault." *See also* Schultz v. Pennsylvania Ry., 350 U.S. 523 (1956); Dice v. Akron, C. & Y. Ry., 342 U.S. 600 (1952); Blair v. Baltimore & O. Ry., 323 U.S. 600 (1945).

26. 102 U.S. 426 (1880).

27. *See also* Franz Equipment Co. v. United States, 122 Ct. Cl. 622 (1952).

be sued only with its consent under the prevailing theory of absolute sovereign immunity, Congress could impose conditions on the privilege of suit, including the relinquishment of the right to jury trial. Such suits were not "at common law within its true meaning."[28] This rationale has been expressly extended to nonjury actions under the FTCA.[29] Prior to the FTCA, only governmental commercial corporations serving as agencies or instrumentalities of the United States were amenable to suit and, thus, were within the scope of the seventh amendment.[30] In *Bank of the United States v. Planters' Bank of Georgia*,[31] the Court explained the reason for this divergent treatment:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. [I]t descends to a level with those whom it associates itself . . . .[32]

Under the FTCA, however, only those government corporations *not* classified as agencies or instrumentalities[33] of the United States are subject to trial by jury.[34] Congress has the power to

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28. 102 U.S. at 443. Further, the notion was advanced that the Court of Claims was created pursuant to the Congress's power to pay debts, U.S. CONST. art. I § 8, rather than the power to create inferior courts, U.S. CONST., art. III, § 1. *E.g.*, U.S. v. Sherwood, 312 U.S. 584 (1941). To uphold Congress's declaration that the Court of Claims was an article III court, Act of July 28, 1953, ch. 253 § 1, 67 Stat. 226 (codified at 28 U.S.C. § 171 (1976)), the Supreme Court abandoned the article I theory in Glidden v. Zdanok, 370 U.S. 530, 572 (1962). Additionally, the nonjury trial provisions of the Federal Tort Claims Act were justified because when a district court heard such actions, it sat as a Court of Claims. *See, e.g., Hearings on H.R. 5373 and H.R. 6463, supra* note 19, at 21 (statement of F. M. Shea).

29. Glasspool v. United States, 190 F. Supp. 804 (D. Del. 1961), also relied on the idea that in such actions the courts sat under article I jurisdiction. *See* note 28 *supra*.

30. *See* Sloan Shipyards Corp. v. U.S.S.B. Emergency Fleet Corp., 258 U.S. 549 (1922); Panama Ry. v. Minnix, 282 F. 47 (5th Cir. 1922).

31. 22 U.S. (9 Wheat.) 904 (1824).

32. *Id.* at 907.

33. As used in this chapter and sections 1346(b) and 2407(b) of this title,

> the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

28 U.S.C. § 2671 (1976).

34. *Compare* 28 U.S.C. § 2402 (1976) *with* 28 U.S.C. § 1346(b) (1976) *and* 28

regulate the seventh amendment's coverage through its capacity to characterize entities as "agencies" or "instrumentalities," and thereby determine whether they are included under the FTCA.[35] The Foreign Sovereign Immunities Act of 1976 (FSIA)[36] is an extension of the domestic solutions to similar problems in the international arena. The FSIA and the restrictive theory of sovereign immunity, which it codifies,[37] are based upon the example of the FTCA. The FSIA makes a foreign sovereign amenable to suit in causes arising from a nation's private acts.[38] Under the FSIA, a nation's "private acts" encompass several classes of cases,[39] including those arising from its commercial activities.[40] The FSIA's primary purpose is to afford United States citizens a forum to seek remedies against foreign states. To accomplish this objective the Act vests in the courts the determination of pleas of sovereign immunity, thereby removing State Department and international political considerations.[41] Further, it makes a foreign state liable for its private acts to the same extent a private party would be under like circumstances.[42] Section 1330, chapter 85, 28 U.S.C., as added by the FSIA, grants the district courts original jurisdiction in actions for monetary damages against foreign states held to be amenable to suit.[43] Section 1603 of the FSIA, as codified, defines a "foreign state" to include any agency or instrumentality thereof, or any foreign entity which is a separate legal person, corporate or otherwise, a majority of which is owned by a foreign state and is neither a citizen of a state of the United States nor created under

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U.S.C. § 2671 (1976); Anderson, *supra* note 24, at 460-61.

35. For example, Congress has declared the National Rail Passenger Corporation not to be an agency or instrumentality. 45 U.S.C. § 541 (1976). Similarly, the Tennessee Valley Authority is specifically exempted from both the Court of Claims' jurisdiction and the Federal Tort Claims Act. 28 U.S.C. §§ 1491, 2680(1) (1976).

36. Pub. L. No. 94-583, 90 Stat. 289 (codified at 28 U.S.C. §§ 1330, 1602-1611 and scattered sections of 28 U.S.C. (1976).

37. H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 7 (1976); *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 (hereinafter cited as H.R. REP. No. 94-1487). *See* Tate Letter, *reprinted in* 26 DEPT. STATE BULL. at 984 (1952).

38. H.R. REP. No. 94-1487, *supra* note 37, at 7, 8, 14.

39. *See* 28 U.S.C. §§ 1603, 1605 (1976).

40. 28 U.S.C. § 1605(a)(2) (1976).

41. H.R. REP. No. 94-1487, *supra* note 37, at 7.

42. Liability does not extend, however, to punitive damages. 28 U.S.C. § 1606 (1976).

43. 28 U.S.C. § 1330 (1976).

the law of a third country.[44] Foreign government-owned shipping lines and airlines are thus considered "foreign states."[45] Since jurisdiction over foreign states is "comprehensively" treated under section 1603, the FSIA amended section 1332 (a) (2) to delete diversity jurisdiction over "foreign states."[46] Federal district court diversity jurisdiction over citizens or subjects of foreign states, however, is retained.[47] To "promote uniformity of decision where foreign governments are involved,"[48] the FSIA eliminates jury trials in both original[49] and removed actions.[50] To encourage the use of the federal courts, and "in view of the potential sensitivity of actions against foreign states,"[51] the FSIA abolishes the amount in controversy requirements in original and removed actions.[52] The FSIA thus attempts to balance the interests of claimants and foreign states by allowing claimants a more certain remedy while granting foreign states opportunities such as nonjury trials and easier removal of actions to federal courts.

III. The Instant Opinion

In the instant case[53] the court faced novel questions regarding conflict between the Foreign Sovereign Immunities Act and the seventh amendment. In concluding that the FSIA did not proscribe the right to jury trial against foreign government-owned commercial corporations, the court examined the changes effected by the FSIA. First, the court noted that the FSIA eliminated diversity jurisdiction over foreign states but not over citizens or subjects thereof.[54] Second, the court concluded that although de-

44. 28 U.S.C. § 1603(a)-(b) (1976). For a discussion of recent decisions interpreting FSIA "ownership" requirements, see 12 VAND. J. TRANSNAT'L L. 165 (1979).

45. H.R. REP. No. 94-1487, *supra* note 37, at 16.

46. *Id.* at 14.

47. 28 U.S.C. § 1332(a)(2) (1976); *see* note 5 *supra.*

48. H.R. REP. No. 94-1487, *supra* note 37, at 13.

49. 28 U.S.C. § 1330(a) (1976); *see* note 7 *supra.*

50. 28 U.S.C. § 1441 (1976).

51. H.R. REP. No. 94-1487, *supra* note 37, at 32.

52. 28 U.S.C. §§ 1330(a), 1441 (1976). *See* R. B. von Mehren, *The Foreign Sovereign Immunities Act of 1976,* 17 COLUM. J. TRANSNAT'L L. 33, 44-45 (1978).

53. The instant opinion is reprinted in 18 INT'L LEGAL MATERIALS at 963 (1979).

54. *Id.* at 965-66. *See* text accompanying notes 46-47 *supra.*

fendant came within the FSIA's definition of a "foreign state,"[55] the structure of the Act did not preclude diversity jurisdiction over defendant. The court considered it significant that while jurisdiction over "foreign states" under section 1330 is cross referenced to that term's definition in section 1603, there is no such reference between section 1332(a)(2) and 1603.[56] The court reasoned that because the definition in section 1603 is limited by its terms to chapter 97 of title 28 U.S.C., it is inapplicable to section 1332(a)(2), which is located in chapter 85.[57] According to the court, the effect of the FSIA's changes is "simply to subject some foreign corporations owned by their governments to suit in a federal court under both Section 1330 and Section 1332(a)(2)."[58] The court also found that prior to the passage of the FSIA the State Department declined to recommend immunity for foreign government-owned air carriers. In light of this prior treatment, the court stated that foreign-owned corporations should be considered "citizens or subjects" rather than "foreign states" under the FSIA[59] and therefore are subject to both diversity jurisdiction and the right to trial by jury.[60] In dicta, the court viewed both the attempt to constrict the right to trial by jury in previous cases and the elimination of jury trials in removed actions as posing possible constitutional problems.[61] To avoid the constitutional issue that might have been raised had Congress successfully eliminated diversity jurisdiction over corporations such as defendant, the court suggested that Congress may have intended the FSIA to apply to foreign states in their sovereign and political, rather than their commercial, capacities.[62] The court recognized a further constitutional difficulty as the instant action presents a "legal" claim. The court reasoned that Congress, having removed immunity from foreign government commercial activities, may be una-

55. 18 INT'L LEGAL MATERIALS at 963, 966 (1979).

56. *Id.* at 967.

57. *Id.*

58. *Id.* at 967, 968.

59. *Id.* at 964, 965, 969.

60. *Id.* at 970, 971.

61. *Id.* at 971, 972.

62. *Id.* It is, of course, more likely that a foreign state will challenge jurisdiction when its commercial acts become instruments of foreign policy. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Carey v. National Oil Corp., 453 F. Supp. 1097 (S.D.N.Y. 1978); text accompanying note 82 *infra*.

ble to restrict the constitutional right to jury trial.[63] Further, the court found support for its position in its characterization of immunity as a "flexible principle of international comity" that, when in conflict with the seventh amendment, must yield to the constitutional mandate.[64] Finally, the court noted that United States government corporations have traditionally been subject to suit in both tort and contract and that the FTCA exempts from jury trial government corporations that act primarily as "agencies" or "instrumentalities" of the United States.[65] The court reasoned, therefore, that its decision holding that the FSIA does not eliminate the right to jury trial in suits against foreign government-owned commercial corporations would further one of the Act's primary purposes by equating the treatment of foreign states with that accorded the United States.[66]

IV. COMMENT

The instant decision should serve to stimulate discussion on both the theoretical justifications for and the practical implications of jury trials in actions against governmental defendants, and therefore, may lead to revision of the FSIA. From a theoretical perspective, although the instant court correctly noted the changes effected by the Act,[67] it failed to perceive the full extent of Congress' power in the domestic context. Congress, by its ability to classify entities as "agencies" or "instrumentalities" of the United States, thereby exempting specific entities from the non-jury trial provisions of FTCA, has the power, in effect, to restrict the scope of the seventh amendment in actions against the United States.[68] Congress' ability to define the term "foreign states" and thereby restrict the right to jury trial may also be justified through its power to regulate commerce with foreign states.[69] Further, the FSIA, although based on the restrictive the-

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63. 18 INT'L LEGAL MATERIALS at 972-73.
64. *Id.* at 973, 974.
65. *Id.* at 974.
66. *Id.* at 974-75.
67. *See* text accompanying notes 43-52 *supra*.
68. *See* text accompanying notes 33-35 *supra*.
69. The Congress specifically invoked its powers to regulate foreign commerce, U.S. CONST. art. I, § 8, cl. 3, and to define offenses against the law of nations, U.S. CONST. art. I, § 8, cl. 10. H.R. REP. No. 94-1487, *supra* note 37, at 12.

ory of sovereign immunity and purporting to make suits against foreign states acting in their private capacities a matter of right,[70] draws its nonjury trial provisions from the FTCA and Court of Claims legislation. The amenability of the United States to suit in tort and contract depends, however, on the absolute immunity theory, under which the right of action is subject to sovereign consent.[71] Thus the FSIA, although based on the restrictive theory, preserves, perhaps incorrectly, the absolute immunity theory's prohibitions against jury trials. From a practical perspective, Congress considered the primary purpose of nonjury trials in actions against foreign states to be the need for decisional uniformity.[72] Nevertheless, it is questionable whether such uniformity is attainable or desirable in cases heavily reliant upon factual determinations, such as presented in wrongful death or negligence actions.[73] Thus the impact of the jury on liability determination and damage assessment,[74] a consideration important to the FTCA framers but unarticulated by the FSIA authors, becomes the sole rationale underlying the FSIA proscription of jury trials in such suits. The possible impact of jury trials must be examined in light of the theoretical justification for, and practical aspects of, diversity jurisdiction. Diversity jurisdiction is designed to prevent, or to assuage fears of, partiality or prejudice on the part of state courts and juries against nonresident parties.[75] Though this rationale has been subject to much criticism,[76] the analogy to diversity jurisdiction is valid in considering actions against foreign states in United States courts. In diversity actions involving legal claims between United States citizens in federal courts, the nonresident party is guaranteed that all jurors will be United States citizens.[77]

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70. It is arguable that since actions against foreign states free from political considerations require statutory authorization, they cannot be a matter of "right."

71. *See* text accompanying notes 26-29, 33-35 *supra*.

72. *See* text accompanying notes 48-50 *supra*.

73. *See generally* PROSSER, *supra* note 16, at 205-08.

74. The impact of the jury's possible sympathy for United States plaintiffs on damage assessment may be less pronounced in actions in which damages can be precisely controlled; unresolved, however, is the question of the impact of possible jury bias on liability determination. *See* text accompanying notes 24-25 *supra*.

75. Bank of the United States v. Devaux, 9 U.S. (5 Cranch) 61, 87 (1809).

76. C. WRIGHT, LAW OF FEDERAL COURTS 86-87 (3d ed. 1976).

77. 28 U.S.C. § 1865(b)(1) (1976).

If, however, jury trials are permitted in actions against foreign states or their entities, such defendants will face juries possibly composed solely of unsympathetic United States citizens.[78] This probability must be evaluated in light of the ability and inclination of juries to find liability and award damages when a judge would have discerned neither.[79] Thus, it is arguable that diversity jurisdiction is incapable of protecting from excessive verdicts foreign governmental defendants perceived as having inexhaustible resources. Although courts may circumvent objectionable or excessive jury verdicts,[80] defendant foreign governmental corporations may harbor doubts regarding the fairness of jury trials.[81] This concern may have three effects. First, defendants may more frequently contest United States jurisdiction due to fear of jury trials. Second, because another factor in the result in the instant case might have been the defendant's concession of jurisdiction,[82] foreign government-owned corporations may be encouraged to challenge United States courts' jurisdiction to obtain nonjury trials.[83] This may cause unnecessary use of both the courts' and the

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78. This possibility is of course lessened when plaintiff is not a United States citizen.

79. *E.g.*, the impact of the jury in Federal Employer's Liability Act Cases; *see* text accompanying notes 24, 25 *supra*.

80. Jury control devices include judgment n.o.v., directed verdict, motion for new trial, and remittitur.

81. Note that foreign apprehensions regarding local prejudice may be more important than the actual existence of such prejudice. *See* WRIGHT, *supra* note 76, at 91: "The key question is not whether out-of-state investors will receive fair treatment from state courts, but whether they think they will."

82. *See* text accompanying note 7 *supra*. Although the court fails to discuss this aspect of the case, *see* text accompanying notes 54-60 *supra*, defendant's concession of jurisdiction may be another factor underlying the decision: Had defendant contested jurisdiction the court might have classified defendant as a "foreign state" under the FSIA, stopped its analysis at that point, and relied on the nonjury trial provision of section 1330.

83. Note that according to the legislative history Congress may have intended the FSIA to apply only when foreign states challenge United States court's jurisdiction. "[T]he 'Foreign Sovereign Immunities Act of 1976' sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity *raised by foreign states* before Federal and State courts in the United States." H.R. REP. No. 74-1487, *supra* note 37, at 12 (emphasis added).

Thus, a defendant's concession of jurisdiction may result in jury trial in two ways: It might be used, first, as in the instant case, *see* note 82 *supra*; second, because it coincides with the legislative intent that the FSIA apply only upon a foreign state's jurisdictional challenge. As mentioned, however, a defendant's ju-

litigants' time and resources. Third, a defendant's concession of jurisdiction or the inapplicability of section 1330 and the nonjury trial provision contained therein may result in the unavailability of other FSIA provisions, such as the eliminaton of prejudgment attachment of foreign state property,[84] or in the frustration of one of the Act's primary stated purposes, the development of a coherent body of law applicable to foreign states.[85] These possible effects could have negative implications for the orderly trial of such actions.[86] Amendment of section 1332(a)(2) to limit diversity jurisdiction to those foreign entities of which less than a majority of the shares are owned by foreign states would eliminate possible problems arising from the use of jury trials.[87] This would leave to the courts only the constitutional question of the ability of Con-

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risdictional concession would avoid unnecessary litigation.

84. *See* 28 U.S.C. §§ 1609-11 (1976); text accompanying note 87 *infra*. Inapplicability of other FSIA provisions may result from the interdependence of Act provisions. *See, e.g.*, 28 U.S.C. §§ 1330, 1603(a), 1609-11 (1976).

85. *See* text accompanying notes 48-52 *supra*. Note that in contrast to the situation involving many tort actions, *see* text accompanying notes 72-74 *supra*, decisional uniformity is still a valid ground for nonjury trial in most actions involving foreign states.

86. For example, attachment of foreign state property not in accord with FSIA provisions may cause foreign governments to request State Department assistance which may reintroduce Department involvement in such suits. Elimination of such involvement was a major goal of the FSIA. *See* text accompanying note 41 *supra*.

87. Such an amendment to section 1332(a)(2) might provide for diversity jurisdiction between "citizens of a State and citizens or subjects of a foreign state, *provided*, that such foreign citizens or subjects are not 'foreign states' as defined in Section 1605(a)(b)(1-2) of this title." This change would effect the cross reference found lacking in the instant opinion. *See* text accompanying notes 56-57 *supra*.

Another possible difficulty in the wording of the FSIA appears in section 1330(a), note 8 *supra*. The language of the statute, —"the district courts shall have original jurisdiction . . . of any *nonjury* civil action,"—can be interpreted to make such actions dependent upon the district court's determination of whether a party is entitled to a jury trial. This is clearly not the legislative intent; *see* text accompanying notes 36-42 *supra*. Such difficulties might be avoided by redrafting section 1330(a) to read: "The district courts shall have original jurisdiction without regard to amount in controversy of any 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 1605-07 of this title or under any applicable international agreement. Such actions shall be tried by the court without a jury."

gress to define the term "foreign states" and thereby restrict the seventh amendment. The reintroduction of jury trials may, however, not have the deleterious effects envisioned, for the benefits flowing from the FSIA may outweigh the possible detriments of jury trials. The Act's major benefits include the elimination of two important foreign relations irritants, the State Department's role in immunity determinations, and prejudgment attachment of foreign government property.[88] The ability of courts to control or circumvent jury verdicts also is a factor in this balance. Thus, the issue of the impact and role of jury trials is crucial to the FSIA. In order to preserve the usefulness of the right of action afforded by the Act, future discussion and determination of the role of jury trials in suits against foreign states should focus on the impact of jury trials on fairness to the parties, an essential goal of the seventh amendment.[89] The parties' faith in the fairness of the courts is essential to their acquiescence to the courts' jurisdiction, rulings, and the orderly conduct of United States' international relations.[90]

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88. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 26, 28 (1976) (statement of M. Leigh).

89. *See* text accompanying note 10 *supra*.

90. *See generally* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (challenge to personal jurisdiction): "[D]ue process requires only that . . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

A foreign governmental defendant's faith in the fairness of United States courts is particularly important due to the defendant's sovereign character and the lack of sanctions in international law. *See* W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 82-86 (1964).